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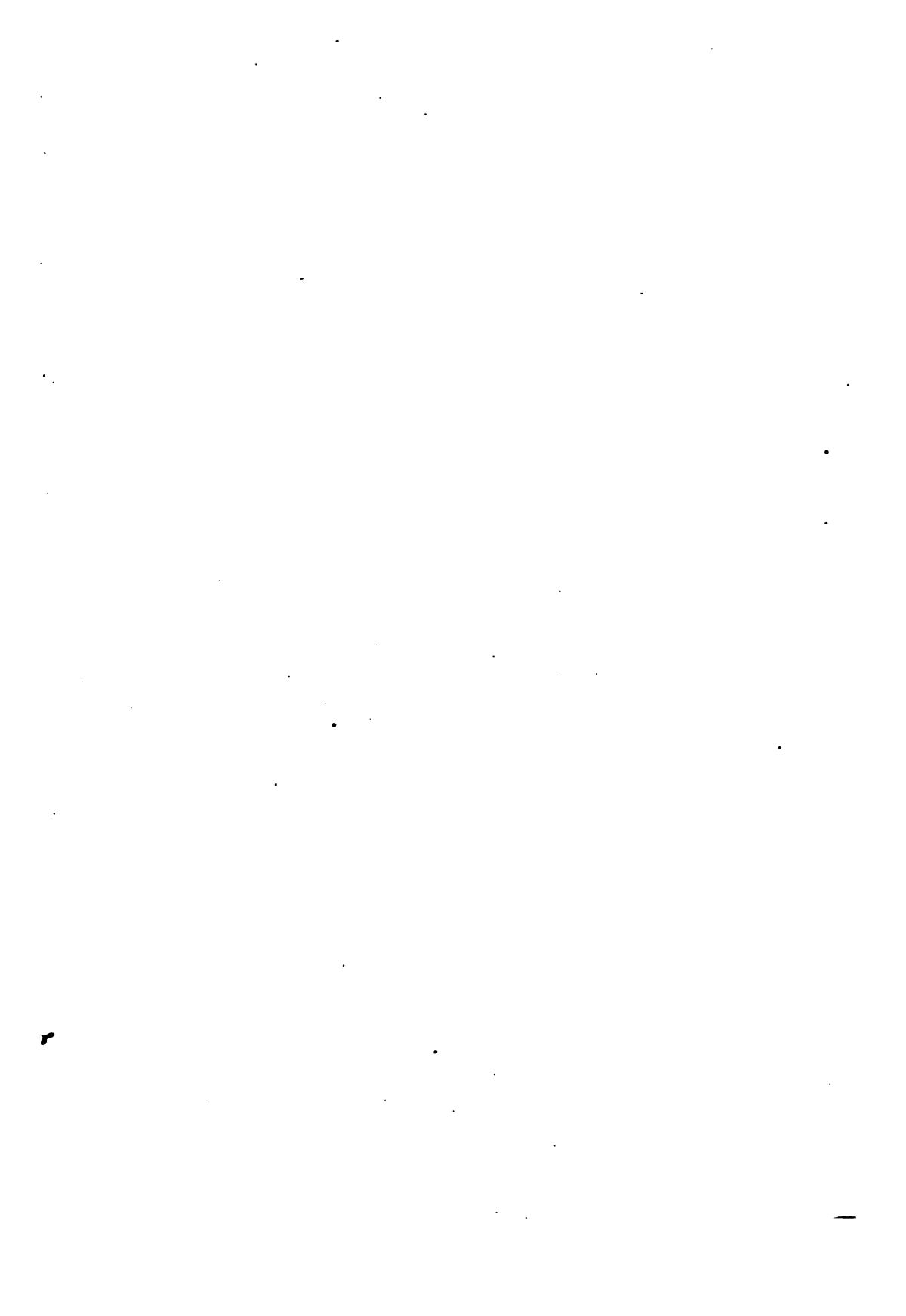


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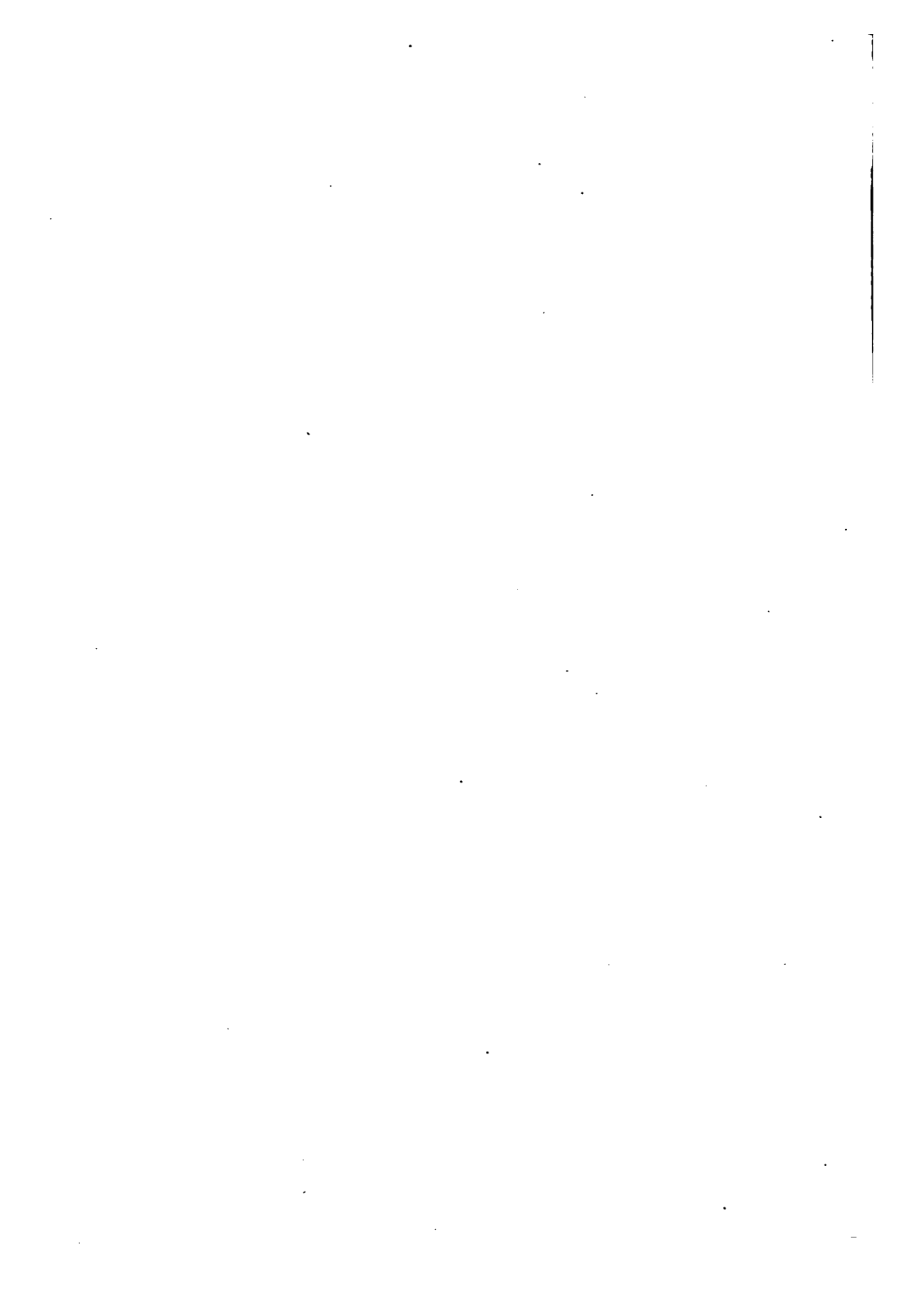
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VERMONT, SUPREME COURT

REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF THE
STATE OF VERMONT

BY
FRANK D. THOMPSON

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ERRATA

- Page 190, for "State v. Bolton, 92 Vt. 158," read 92 Vt. 157.
Page 254, for "Waterman v. Moody, 92 Vt. 219," read 92 Vt. 218.
Page 257, for "In re Bugbee's Will, 92 Vt. 176," read 92 Vt. 175.
Page 294, for "State v. Eaton, 92 Vt. 291," read 92 Vt. 290.
Page 337, for "Wells v. Blodgett, ante p. 332," read ante p. 330.
Page 451, for "In re Ketchum, 92 Vt. 281," read 92 Vt. 280.
Page 512, for "Freeman v. Barron's Est., 92 Vt. 462," read 92 Vt. 460.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF VERMONT

PORTER SCREEN MANUFACTURING COMPANY v. CENTRAL VERMONT
RAILWAY COMPANY.

May Term, 1917.

Present: WATSON, C. J., HASLTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

Motion for Directed Verdict—When too General—Rules and Regulations—Common Knowledge—Evidence—Materiality—Railroad Freight Agent—Notice of Contents of Freight Car—Presumption—Jury Question—Act of God—Floods—Weather Predictions—Reliance Thereon—Negligence—Newspaper Publications—Notice—Prejudicial Error—Charge—When Without Error.

A motion for a directed verdict which fails to point out any precise basis upon which it is predicated is too general for consideration.

Rules of the American Railway Association and Regulations of the Interstate Commerce Commission, providing that inflammable substances, including unslaked lime, shall be loaded on freight cars in a certain manner, are to be understood in the light of common knowledge of the effect of water upon unslaked lime and therefore testimony of a railroad freight agent as to his knowledge of this fact cannot be said to be immaterial.

Where the freight agent of a railroad knew that a car, stated to be loaded with lime, might contain either slaked or unslaked lime, he was put upon inquiry regarding it, and was taken to have had full knowledge in this respect.

It will not be presumed that a freight car was defective, and in need of repairs because it had been placed upon a track used as a repair track, where the question whether the track was exclusively used for such purpose was, on the evidence, for the jury.

Damages caused by an act of God are those proximately due, directly and exclusively, to natural causes without human intervention, which could not have been prevented by any amount of foresight reasonably to be expected.

A railroad company is responsible for damage to a shipment of merchandise on a car in its freight yard, caused by a flood of such an unprecedented character as to be an act of God, which damage might have been avoided or prevented by human prudence, foresight, pains and care reasonably to be expected from the carrier, but not exercised by it.

On the evidence *held*, defendant's freight agent was not, as matter of law, justified in relying upon a prediction by a weather forecaster, published in a newspaper, as to the probable danger to be expected from a flood.

In an action against a railroad company to recover damages for the failure to deliver merchandise which it had undertaken to transport, while in transit, *held*, the negligence of a connecting carrier in failing to take measures for the protection of the goods against high water was a jury question.

Printed articles in a public newspaper do not have the effect of constructive notice of the facts stated therein; at most they are only actual notice, and not that unless they are read.

In an action against a railroad company to recover damages for the failure to deliver property which it had undertaken to transport, and which was destroyed, while in the freight yard of a connecting carrier, by fire caused by high water from a river coming in contact with a nearby car of unslaked lime, the admission of evidence that a local weather forecaster sent out notices of approaching high water to third persons in the vicinity was prejudicial error, it having appeared that the connecting carrier, during periods of high water, usually telephoned or sent to the forecaster for information.

An exception to an instruction given as requested by the exceptor is without force.

There can be no error in failing to charge in a manner not applicable to the evidence.

CASE for negligence in failing to deliver a carload of screens that defendant had undertaken to transport as a common car-

rier. Plea, the general issue with notice. Trial by jury at the September Term, 1915, Chittenden County Court, *Miles, J.*, presiding. Verdict and judgment for plaintiff. Defendant excepted.

At the close of all the evidence, defendant moved for a directed verdict. Motion overruled to which defendant excepted. The opinion states the case.

John W. Redmond for defendant.

The flood was an act of God. *Eagan v. Central Vermont Ry. Co.*, 81 Vt. 141.

The burden is on plaintiff to show that the negligence of the connecting carrier mingled with the act of God as an active, co-operative and proximate cause of the damage. It is not sufficient merely to show the non-delivery of the shipment. The doctrine that the carrier is an insurer does not apply.

Memphis R. R. Co. v. Reeves, 77 U. S. 176; *Ryan v. Missouri, etc., R. R. Co.*, 65 Tex. 13; *Terre Haute, etc., R. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781; *Hull v. Chicago, etc., R. R. Co.*, 41 Minn. 510, 43 N. W. 391; *Jones v. Minneapolis, etc., R. R. Co.*, 91 Minn. 229, 97 N. W. 893; *Armstrong, Byrd & Co. v. Ill. Cent. R. R. Co.*, 29 Oka. 352, 109 Pac. 216; *Long v. Penn. R. R.*, 147 Penn. St., 343, 23 Atl. 459; *Little Rock, etc., R. R. v. Talbot*, 39 Ark. 523; *Mitchell v. U. S. Express Co.*, 46 Iowa 214; *New Orleans v. New Orleans, etc., R. R. Co.*, 20 La. Ann. 302; *Kansas Pac. R. Co. v. Reynolds*, 8 Kans. 623; *Sager v. Portsmouth, etc., Co.*, 31 Me. 628; *Jordan v. Am. Ex. Co.*, 86 Me. 225, 29 Atl. 980; *Read v. St. Louis, etc., R. R. Co.*, 60 Mo. 199; *Davis v. Wabash, etc., R. R.*, 89 Mo. 340, 1 S. W. 327; *Witting v. St. Louis, etc., R. R. Co.*, 101 Mo. 631, 14 S. W. 734, 10 L. R. A. 602; *Smith v. Am. Ex. Co.*, 108 Mich. 572, 66 N. W. 479; *Whitworth v. Erie, etc., R. R.*, 87 N. Y. 413; *Smith v. North Car. R. R. Co.*, 64 N. Car. 235; *Farnham v. Camden, etc., R. Co.*, 55 Pa. St. 53; *Hubbard v. Harnden Ex. Co.*, 10 R. I. 244; *Railway Co. v. Manchester Mills*, 88 Tenn. 653; *Washburn-Crosby Co. v. William Johnson Co.*, 125 Feb. 273; *Clark v. Barnwell*, 12 How. 272; *Transportation Co. v. Downer*, 11 Wall. 129.

The fact of publication of articles in newspapers in no way tends to show knowledge of what is contained therein by one shown merely to have had the opportunity to read them. *State v. Alpert*, 88 Vt. at p. 202; *American Ice Co. v. Narvey*, 56 Neb. 482; *King v. County*, 29 N. J. Law 94; *Belyhoover v. Blackstock*,

3 Watts. 20, 27 Am. Dec. 156; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156.

The testimony of Todd as to his custom in giving publicity to his forecasts was not admissible. *Philip v. Conant*, 30 Vt. 277; *Walsworth v. Barren*, 54 Vt. 677; *Harris v. Howard*, 56 Vt. 695; *Aiken v. Kennison*, 58 Vt. 665; *Bishop v. Wheeler*, 46 Vt. 409; *Jones v. Ellis*, 68 Vt. 544; *Pictorial League v. Nelson*, 69 Vt. 162.

Ezra M. Horton and Warren R. Austin for plaintiff.

The failure of the connecting carrier to take any precaution whatever, in view of the situation, was negligence, and was concurrent with the act of God in causing the damage. *Dunson v. N. Y. C. R. R. Co.*, 3 Lansing 265-269; *Graham & Co. v. Davis & Co.*, 4 Ohio St. 362, 380; *Fentiman v. A. T. & S. F. R. Co.*, 44 Tex. Civ. App. 457, 461, 462; *Reed v. Spaulding*, 30 N. Y. 630, 64 *et seq.*; *Hayes v. Kennedy*, 41 Penn. St. 378-381, 384; *National Rice Milling Co. v. New Orleans N. E. R. Co.*, 61 So. 708, 718-722.

The newspaper articles were admissible. 4 Chamberlayne, Mod. Law of Ev., Secs. 2581, 2668.

WATSON, C. J. Although the trial of this case was by jury, the material facts were largely established by agreement of parties. As will be seen, there was really but one disputed primary question of fact submitted to the jury.

It appeared from the agreed facts that on March 24, 1913, the plaintiff, at Winooski, this State, loaded Grand Trunk car No. 9447 (hereinafter designated as "car 9447") with screen doors and window screens, valued at \$824.13, and the car so loaded was then received by the Central Vermont Railway Company for transportation by it and connecting carriers to the Eastern District Terminal in Brooklyn in the State of New York, in accordance with the bill of lading delivered by the defendant to the plaintiff; that in the course of such transportation the car left Winooski on March 25, 1913, was hauled over the lines of the successive carriers to Troy, N. Y., where it arrived on March 27, and by the Delaware and Hudson Railroad was there delivered to its connecting carrier, the New York Central and Hudson River Railroad Company (called in this case the "N. Y. C.")

at 12.15 p. m. of that day, by which it was then and there accepted for transportation over its line to the place of destination; that after thus receiving the car, the latter carrier placed it in its freight yard at Adams Street station in Troy, on the track designated as track "No. 2," on the blue print marked "plaintiff's Exhibit D," at a point about two hundred feet south of Adams Street. The exact time in the afternoon when this car was thus placed on track No. 2, is a little in doubt: some of the evidence tending to show it to have been between 12.30 and 1.00, and some, that it was between 1.30 and 2.00. It further appeared from the agreed facts that L. & N. car No. 94242, (hereinafter designated as "car 94242",) loaded at Chazy, N. Y., with unslaked lime, and destined for Worcester, Mass., was delivered by the Delaware and Hudson Railroad to the N. Y. C. at Troy, at 1.10 p. m., on March 26, 1913, and later in the same day it was placed by the latter company in its said yard on the track designated as "No. 3," on the blue print, Exhibit D, this track being the next parallel track west of No. 2, mentioned above. When car 9447 was placed on the latter track, it stood opposite the car of lime, and, taking into account the overhang, the two cars were about three feet apart, thus remaining until they were destroyed by fire as stated below. The elevation of top of rail of track No. 3, where the car of lime stood, is 21.62 feet above sea level, and top of rail of track No. 2, where the other car stood, is 21.73 feet above sea level. The rails are five inches high, and the floor of a freight car is substantially four feet above top of rails. The yard is somewhat descending from the place of these cars west toward the river. East and south from the same place, it is more or less ascending.

It appeared from the evidence that the waters of the Hudson River above Troy rose to a great height, creating an unprecedented flood at the latter place, and overflowing Adams Street yard to such a depth that they entered the said carload of lime, slaked the lime, thereby causing heat which set fire to the car. This fire was communicated to car 9447, destroying it and all its contents. The evidence showed that the flood there (being one free from ice) was unparallel in history, and beyond question of such magnitude as to be an act of God, within the meaning of that term; yet the plaintiff contended that the defendant was not entitled to the benefit of immunity from responsibility as is usual in cases coming under the term "act of God," for the reason that

the evidence showed negligence on the part of the N. Y. C., in not exercising the requisite degree of care and diligence to protect the plaintiff's property from such destruction, after the railroad company foresaw or, in the exercise of due care, should have foreseen, with reasonable probability, the happening of such high water as was likely to subject it to extraordinary dangers, as the car was located with reference to the car loaded with unslaked lime. On the other hand, the defendant claimed that, by the tendency of the evidence, the proximate cause of the destruction of the property was the unprecedented flood, without any contributing negligence on the part of the carrier. It was agreed by the parties that in all respects the relationship between defendant and the N. Y. C. was such that under the federal statute known as the "Act to Regulate Commerce" (Act Cong. Feb. 4, 1887, C. 104, 24 Stat. 379), and the amendments thereto, the former, as the initial carrier is liable to the plaintiff for any damage to the shipment mentioned, proximately caused by the negligence of latter, as connecting carrier. The bill of lading, section 1, states that the carrier or party in possession of the property therein described shall be liable for any loss thereof or damage thereto, except that no carrier or party in possession "shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy," etc.

At the close of the evidence, the defendant moved for a directed verdict, assigning as grounds therefor (stated in condensed and comprehensive form) that on all the evidence (1) the plaintiff is not entitled to recover; (2) the sole proximate cause of the destruction of the property in question was an act of God; (3) no negligence on the part of either the defendant or the N. Y. C., concurred with the act of God as a proximate cause of the destruction of such property. The motion was overruled, and exception saved.

The first ground of the motion fails to point out any precise basis upon which it is predicated, and is therefore too general for consideration. *Castonguay v. Grand Trunk Ry.*, 91 Vt. 371, 100 Atl. 908. The other two grounds are considered together.

At the time in question, Leland Wadsworth was freight agent for the N. Y. C. at Troy, having general supervision of the freight traffic, including the freight yard of the company at that place, and including also the movement of trains in the yard. He resided at Troy. At that time, Charles A. Lloyd was day

yard-master of the Adams Street yard, had charge of the yard, and direct charge and control of the movement of trains in and out and about the yard, under the supervision of the freight agent. At the same time, Patrick J. McCormick was night yard-master, his duties at night and his authority being similar to those of Lloyd in the day time. The yard-master knows where every car is located in the yard. There was a "running slip" accompanying car 94242, showing the car number, initial, destination, contents, and consignee, which paper came into the freight agent's office in Troy, in the usual way, intended to convey to such agent the information specified on it, about noon of March 26th. Indeed, in connection with the plaintiff's introduction of evidence showing this, counsel for defendant conceded that there was no question about the facts of this matter; that the N. Y. C. knew it had a carload of lime on that day. Knowing this, and further knowing what car it was, and where it was located on track No. 3, the railroad company knew that this car was still at the same place the next day, when car 9447 was received and placed directly opposite on track No. 2, so that the two cars were within 3 feet of each other.

The American Railway Association Rules and the Interstate Commerce Commission Regulations for the Transportation of Dangerous Articles other than Explosives, before and at the time in question, state that: "Carload lots of crude camphor, cotton, * * * or other articles liable to be ignited by sparks, as well as unslaked lime and calcium carbide, both of which must be protected from water, should, when practicable, be loaded in tight cars, with doors stripped, and, when practicable, these cars must not be placed next to cars placarded 'EXPLOSIVES.'"

The freight agent testified to receiving a copy of the rules and regulations mentioned, and to knowing about the foregoing rule; but that he did not know that if water entered the carload of lime and slaked the lime, it would set fire to the car; that a set of those regulations was also transmitted to the yard-masters, and that schools were held for the instruction of them and their crews in the prudent handling of explosives and other dangerous matters; that the rule did not convey to him the idea that the writer of it meant that lime, when slaking, was likely to burn a car; but conveyed to his mind only the idea that if the lime became wet it would be spoiled. This rule was received in evidence subject to defendant's exception on the ground of immateriality.

But we think it cannot be said to be immaterial. The rule is to be understood in the light of common knowledge that unslaked lime is slaked by the action of water upon it, and if the quantity be large, much heat is produced and perhaps fire. Considering the classification made (in the rule) for transportation purposes, the imperative direction to protect unslaked lime from water, and the provision, applicable alike to cars loaded with such lime and to those loaded with articles liable to be ignited by sparks, as to not placing the cars next to cars loaded with explosives, it may well be said that, reasonably understood, the rule is notice to a common carrier, its agents and servants having freight traffic in charge, that if a car, loaded with unslaked lime, be entered by water, the slaking of the lime caused thereby is liable to result in firing the car. The freight agent testified, however, that the "running slip" accompanying car 94242 stated its contents to be "lime," without specifying whether it was slaked or unslaked, and consequently he did not know the lime to be of the latter character; that there is a commodity known as "slaked lime," and also one known as "unslaked lime." But knowing that the lime might be of either character, one a dangerous commodity in transportation, and the other not, he was put upon inquiry regarding it, and will be taken to have had full knowledge in this respect.

The ice had gone out of the river. The flood was caused by rainfall which covered a period from March 21st to March 28th, inclusive. During that period the precipitation in the watershed of the Hudson River above Troy, was approximately $5\frac{1}{2}$ inches. The evidence tended to show that at Troy, at 7.00 in the morning of the 26th, the height of the water in the river was 17.7 feet above sea level; that after the 26th the observer was not able to get near enough to the gage to read it, the water was so high; that on the 28th the water at Troy rose to the height of 29.4 feet; that the records of the Weather Bureau in Albany, seven miles from Troy, showed the height of the water above sea level on the 27th at 8.00 a. m., and at intervals of half an hour thereafter until 11.30 p. m.; that at Troy the average would be from 5 to 7 feet higher than at Albany. The evidence further tended to show that the water began to come into the Adams Street yard in the forenoon of the 27th, rising gradually and continually. Whether it came up to or over track No. 2, at the time when car 9447 was placed upon it, is not quite certain;

but the evidence tended to show that at about 2.30 p. m., it had so risen as to be five inches deep over the rails; that then it was impossible to get into that track, because of timbers floating about in the water. At 6.30 p. m., the water was fifteen inches over the rails, later increasing to about five feet. There was no evidence that the N. Y. C., or any of its agents or servants, did or attempted to do anything by way of moving car 9447 from where it stood on track No. 2, to a place of safety, after the water began to come into the yard. It appeared that freight agent Wadsworth and yard-master Lloyd were about their duties at that yard, as usual, throughout the day of the 27th, observed, and knew of the rise of water in the river, also in the freight yard after it began to come in there.

The evidence tended to show that track No. 3 was a repair track upon which cars in a badly broken condition were placed for repairs; that the car containing the lime was in such condition and consequently was placed upon that track; and that principally because of such broken condition, it could not be taken therefrom before the water had risen so high as in itself to prevent so doing. There was no evidence upon which it can be said that the putting of this car there was negligence on the part of anyone. Some of the evidence tended to show that track No. 2 was exclusively used as a repair track and upon it were placed cars slightly damaged; while other evidence tended to show that it was a sort of miscellaneous track, used to put any cars on, if need be. There was no direct evidence that car 9447 was defective when put upon that track; but the fact of its being placed there is urged as showing that it needed repairs, and this upon the principle that everything is presumed to be rightly and duly performed until the contrary is shown, citing *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. ed. 552, and other cases. Yet this rule of presumption presupposes the two facts upon which it must here be based, namely, that track No. 2 was used exclusively as a repair track, and that car 9447 was placed thereon, to be permanently fixed. The second of these facts stands as conceded; but the existence of the first (the major premise) was of necessity a question to be determined by the jury upon evidence the tendency of which was not all one way. It follows that in disposing of the exception to the overruling of the motion for a directed verdict, the principle invoked does not apply. 3 Harv. L. Rev. 162.

The plaintiff used the deposition of George T. Todd who testified that he had been in charge of the United States Weather Bureau in Albany for over ten years, and was thus in charge at the time of this flood; that the object of the office there is to forecast the weather and flood conditions in that vicinity, and to give the forecasts to the public; that during the period of the flood in March, 1913, his forecasts were published through daily weather maps, also in daily newspapers published in Albany, every effort being made to reach business and manufacturing interests of all kinds in the vicinity; and the same were telephoned to the *Troy Times*, a daily newspaper published in Troy; that water freshets there can be forecasted 24 to 36 hours in advance; that such forecasts are formulated from information received from river-gaging stations in the upper tributaries of the Hudson and the Mohawk rivers, and are very correct; that on the morning of March 26, 1913, he sent out forecasts of the freshet, and at 10.00 in the forenoon of the 27th he sent out a forecast of a severe flood which would probably reach a height of 25 to 26 feet at Troy, and telephoned the same to the office of the *Troy Times*; that the height reached was even greater than forecasted, it being at Troy 29.4 feet; that deponent was at the telephone all day of the 27th, answering inquiries in regard to the flood; that the N. Y. C. usually called him by telephone during periods of high water, numerous times a day, but he could not swear that it called him on that day; nor could he remember whether he furnished the company a map prior to this flood, but thought he did to some man in the company, though did not know who he was; that at the time of this flood and before, the N. Y. C. generally called up by telephone or sent some man to the office. The evidence tended to show that freight agent Wadsworth and yard-master Lloyd knew that for a score of years or more the United States Government had maintained a Weather Bureau and forecaster at Albany, but that neither of them took any steps to ascertain from the forecaster at the time of this flood, the probabilities as to the height the waters of the Hudson might reach or when; that the superintendent of the N. Y. C. had his office in Albany, and from there directed operations in Troy, but gave no directions on March 27th, looking to the protection of freight or freight cars in the yard at that place, from the consequences of the pending flood.

The foregoing is a general statement of the condition of things at Troy on March 27th, and of the actions and doings of the carrier last named, its agents, and servants, material to this action. Greater detail in stating some of the evidence, however, is necessary later, in passing upon questions presented concerning it. In order to be a defence to the action, as an act of God, the damages suffered by the plaintiff must have been "proximately due, directly and exclusively, to natural causes without human intervention, which could not have been prevented by any amount of foresight, pains, and care, reasonably to be expected." *Eagan v. Central Vermont Ry. Co.*, 81 Vt. 141, 69 Atl. 732, 16 L. R. A. (N. S.) 928, 130 Am. St. Rep. 1031. But if the damages were not due exclusively to such natural causes, in other words, if the negligence of the carrier, as an active and cooperative cause, mingled with the operation of the natural causes, the injury was not, in a legal sense, the act of God. So if the injury which the flood occasioned might have been avoided or prevented by human prudence, foresight, pains, and care, reasonably to be expected from the carrier, but not exercised by it, the defendant is responsible. *Nugent v. Smith*, 1 C. P. D. 423, 1 Eng. Rul. Cas. 218; *Smith v. Western Railway*, 91 Ala. 455, 8 South. 754, 11 L. R. A. 619, 24 Am. St. Rep. 929; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Michaels v. New York Cent. R. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406; *Baltimore & O. R. Co. v. Keedy*, 75 Md. 320, 23 Atl. 643; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 10 L. ed. 909; *Hecht v. Boston Wharf Co.*, 220 Mass. 397, 107 N. E. 990, L. R. A. 1915 D, 725, Ann. Cas. 1917 A, 445; 4 R. C. L. 719. In *Davis v. Central Vermont R. R. Co.*, 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852, it was found that the loss by fire of the grain while in the elevator of the defendant, occurred without its negligence; but that, if the defendant had acted upon the orders of the plaintiff and removed the grain from the elevator as soon as the trial court found it should have done, the grain would have been removed before the fire. This Court said the proximate cause of the loss was the fire, and the delay in moving the grain the remote cause, and consequently the defendant was not responsible. In discussing the question, however, the Court stated that if the defendant could have protected the property from fire, after it knew the fire existed, by the exercise of reasonable prudence and diligence, and did not, it

would have been liable for its failure to use this measure of prudence and diligence to protect the property,—thus recognizing the rule laid down above.

Freight agent Wadsworth was a subscriber for the *Troy Times* and read it regularly about 7.00 p. m. each day. This paper is issued about 4.00 p. m. He saw and read what the issue of March 26th gave as the forecasts concerning the high water, made at the Weather Bureau; but he did not read the issue of the 27th, he being called from home in the evening. It is said that the issue of the 26th, which he read, gave, as coming from Forecaster Todd, the following:

“The river is beyond its banks along the lowlands, but no great danger is anticipated, because there is no ice to hamper the flow.”

In argument, after making reference to this prediction, and to observations made by Wadsworth and Lloyd about 4.30 p. m., on the 27th, as to the height and condition (stationary or otherwise) of the water, it is asked whether Wadsworth did not have a right to rely on the foregoing prediction of Todd. But it cannot be said, as a matter of law, that he did. In the first place, the observations made by him and Lloyd about 4.30 p. m. of the 27th, were in point of time some two hours after the water became so high that, according to the evidence, the car containing the plaintiff's goods could not be removed from track No. 2; hence these observations afford no basis for the argument. As to the prediction, the rain was continuing in the forenoon of the 27th, and the water was still rising. Both of these facts were known to the freight agent and the yard-master. The conditions were such that a new forecast was sent out from the Weather Bureau at 10.00 in the forenoon, and the forecaster remained at the telephone all day, answering inquiries respecting the flood. The predictions, as sent out at the hour last named, were of a severe flood in which the water would probably rise at Troy to a height of 25 to 26 feet. At the latter height, the water would be some inches above the floor of a freight car standing where the car of lime stood, and therefore high enough to enter the car to some extent, the floor of a freight car, as before seen, being substantially four feet above the top of the rails which are five inches high. The predictions made by Todd on the 26th; the knowledge of the freight agent and the yard-master concerning previous high waters with reference to coming into that yard;

the conditions as they saw them throughout the forenoon and until 2.00 p. m. of the 27th; the known public means provided by law for ascertaining and recording probabilities as to flood conditions in that vicinity, and giving information relative thereto; the availability of such information, and whether resort thereto would reasonably be expected from a careful and prudent man;—these were all matters to be considered with the other evidence in the case in determining the question of proximate negligence on the part of the carrier.

We think the evidence tended to show such negligence in failing to protect the plaintiff's property after the officers, agents, and servants, of the carrier knew, or, in the exercise of the care and diligence of a careful and prudent man, ought to have known, of the dangers threatening from the impending flood. And it was for the jury to say on all the evidence whether the prudence, foresight, care, and skill, reasonably to be expected from the carrier for the preservation of this property, did not require that the car containing it be not placed where it was on track No. 2, in such close proximity to the car loaded with lime, at the time it was placed there, or if put there in the first instance, that it be removed to some safer place in the yard while the condition of the water was such that it could yet be done. The motion for a directed verdict was properly overruled.

Many exceptions were taken to the admission of evidence, which might better have been presented for review, in groups, resting upon the assumption that the ruling as to one would be the ruling as to all involving only the same legal question. Exceptions of the first group are to the reception in evidence of parts of certain articles printed in newspapers published in Albany and in Troy. In connection with the testimony of deponent Todd, the plaintiff offered in evidence certain parts of a news-article in the *Albany Evening Journal*, a daily newspaper published at Albany, for March 26, 1913, reading as follows:

"March 26, 1913. River will rise to nearly sixteen feet. At noon it was twelve and one-tenth feet above sea level and will continue to rise during the day * * *. At 8 a. m. yesterday the stream was 7.9 feet above the sea level. At 8 a. m. today it was 10.8 feet; at 10.30 a. m. it had risen to 11.7 feet and at noon to 12.1 feet. Forecaster George T. Todd said that he believed the river will rise to 15 or 16 feet by tomorrow morning. He bases his statement on the heavy rainfall last night throughout the

Mohawk Valley and on the Hudson watershed. Tribes Hill during the 24 hours ending at 8 a. m. had 1.10 inches of rain and the average through the Mohawk Valley was about that amount."

This evidence was offered "solely as showing the availability of information and the publicity given to these forecasts as to the probable rise in the river." Objection thereto was made on several grounds, one of which was, that there was no evidence in the case tending to show that the defendant or any of its connecting carriers in question had any knowledge of the contents of that paper. In admitting the evidence, the court told the jury that it was not proof of the facts stated in the paper, but was introduced to show what information was available to the defendant if it had sought for it, as bearing on the question of whether the defendant, if it did not, ought to have known it, or ought to have made inquiry for itself and for the protection of the property it had in charge. Exception was saved. The deponent testified to giving to that newspaper the forecasts and information, the substance of which was used as the basis of the portion of the paper received in evidence. This, however, was not enough to render that part of the printed article legitimate evidence, even for the limited purpose specified. It had already been shown beyond question that the N. Y. C., and its agents and servants having supervision or charge of the matter of freight traffic at Troy, knew of the existence of the United States Weather Bureau at Albany, and of the maintenance there of a weather forecaster. The company and its said agents and servants had knowledge of the rise of water at Troy from day to day until it reached the proportions of an unprecedented water freshet, and during all that time had knowledge that forecasts as to probabilities could be had by application at the Weather Bureau by telephone or otherwise. This being so, on what principle was the article printed in the newspaper named admissible without evidence that it had been seen and read by some one or more of the aforementioned agents or servants of the railroad company? How did the evidence show that company, or its agents and servants, the availability of the information regarding the probable rise of the water, unless such article was notice to them of what was contained in it? The law does not give such printed articles in a public paper the effect of constructive notice. At most they can be only actual notice, and not that unless they are read. Without being read, they have no more

force as notice than any fact orally and publicly spoken at a place where the person claimed to be affected was not present. The reception of the part of the paper was therefore error. *State v. Alpert*, 88 Vt. 191, 92 Atl. 32; *Beltzhoover v. Blackstock*, 3 Watts. (Pa.) 20, 27 Am. Dec. 330; *Lincoln v. Wright*, 23 Pa. St. 76, 62 Am. Dec. 316; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156; *Hartford Trust Co. v. West Hartford*, 84 Conn. 646, 81 Atl. 244, Ann. Cas. 1912 D, 997.

Exceptions of the second group were taken on the ground of immateriality, to testimony given by the same deponent as to the custom at the office of the Weather Bureau, with respect to giving publicity to the forecasts there made, the testimony being that flood predictions are usually printed on daily weather maps which were mailed to about forty business houses and public places in Troy at the time of the flood in question; that flood predictions were given by telephone to a list of merchants who are in the flood district in Albany; and by warning and telephoning to the *Troy Times*; that the Chamber of Commerce at Albany had received forecasts since 1905, and probably prior thereto; that Bradstreet Company received them at Troy,—these are some of the instances where the same question was raised. We need not consider when, if ever, evidence of such service to, or relations with, third persons may properly be received. In the undisputed circumstances shown by the plaintiff that during periods of high water the N. Y. C. usually called the forecaster by telephone numerous times a day, and at the time in question generally called him up by telephone or sent some man to the office of the Weather Bureau, with respect to obtaining information regarding probabilities, what force could the collateral facts shown have in the case other than to excite prejudice in the minds of the jurors against that railroad company because it did not take steps to procure such information on March 27th, before the water had risen so high that effective measures for the protection of the plaintiff's property were no longer possible? Such facts afford no reasonable presumption or inference as to the fact of negligence in failing seasonably to take such measures, and the reception thereof in evidence was harmful error. 1 Greenl. Ev. § 52; *Lucia v. Meech*, 68 Vt. 175, 34 Atl. 695. Since a reversal must be had because of errors in rulings relating to the admission of evidence, the exceptions to argument of counsel are passed without further notice.

Many exceptions were taken to the charge, errors therein being asserted, both of omission and of commission. But the questions thus raised are in effect covered by what we have said upon the motion for a directed verdict, except two: Nos. 3 and 12. As to the former, defendant excepted to the court's failure to charge specifically that the burden was on the plaintiff to show that the negligence of the N. Y. C. mingled with the act of God as an operative and proximate cause. But the court charged fully and carefully in this respect as requested. The jury were instructed that it had been argued by counsel for plaintiff and conceded by counsel for defendant that on all the elements necessary for the plaintiff's recovery, the burden was on the plaintiff, explaining the meaning thereof—following this by calling attention to the fact that the court had already said that in order for the plaintiff to recover it must establish the fact that the proximate cause, or contributing cause, of the injury was the negligence of the defendant. This exception is without force.

The latter of these two exceptions was to the failure of the court to charge that, in determining whether the N. Y. C. acted as a prudent man in respect to the safety of plaintiff's property, they should take into consideration the duties and responsibilities of that carrier to its other patrons who had property in its yard and custody. Thereon it is said that the evidence shows that every month that railroad company handles 15,000 freight cars coming in and going out of the Adams Street yard; and it is argued that, as a prudent man, the company had other things to attend to besides plaintiff's car of screens. Yet it appeared further that on March 27, 1913, only about 200 such cars were handled there. It is enough to say of this exception, that there was no evidence tending to show any act done, or omitted to be done, relative to the preservation of the plaintiff's goods, because of any duties or responsibilities of the carrier to other patrons of the class mentioned in the exception. There can be no error in failing to charge in a manner not applicable to the evidence. *Hyde v. Swanton*, 72 Vt. 242, 47 Atl. 790; *Sherwin v. Rutland R. R. Co.*, 74 Vt. 1, 51 Atl. 1089; *Smith v. Central Vermont Ry. Co.*, 80 Vt. 208, 67 Atl. 535.

Judgment reversed and cause remanded.

NEW YORK MOLINE PLOW COMPANY v. B. H. MAECK.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

Municipal Courts—Jurisdiction—Fraud, Accident and Mistake Statute.

Prior to the taking effect of No. 254, Acts 1917, a city or municipal court had no jurisdiction, under the Municipal Court Act, of petitions brought under P. S. 2033, known as the "fraud, accident and mistake statute."

PETITION for leave to enter an appeal from the judgment of a justice of the peace, under P. S. 2023, brought to the city court for the City of Burlington. Petitionee moved to dismiss the petition upon the ground that the court had no jurisdiction or authority to consider or hear the petition or to enter judgment therein. A hearing on the motion before the city court, C. S. Palmer, Judge. Judgment, granting the motion, *pro forma*, and dismissing the petition. Petitioner excepted.

Max L. Powell for petitioner.

M. G. Leary for petitionee.

WATSON, C. J. The plaintiff, on December 26, 1916, filed its petition in Burlington city court, praying for leave to enter an appeal from the judgment of a justice of the peace, relying upon section 2023 of the Public Statutes for thus bringing its petition. The city court dismissed the petition on the ground that it had no jurisdiction of the subject-matter, to which the plaintiff excepted.

The section of the statutes mentioned is what is known as "the fraud, accident and mistake statute," and the power there given is exclusively to the county courts. The plaintiff, however, contends that under Act of 1915, No. 91, municipal and city courts are impliedly given the same powers when by law the ap-

peal is to be taken to such a court, and our attention is called to various provisions of the act, in support of this contention. We notice these provisions below, in their order.

By section 4, each municipal and city court shall have the same powers and duties concerning its judgments, records, and proceedings, as the county court. But the provisions of P. S. 2023 give a county court a similar power over the proceedings of a justice, when a party has been deprived of his day in court by fraud, accident or mistake, that the county court might exercise over its own proceedings. *Mosseaux v. Brigham*, 19 Vt. 457.

Section 8 relates to prosecutions of a criminal nature before a justice, exceeding his jurisdiction to try and determine. These provisions carry with them impliedly no powers similar to those granted to county courts under the fraud, accident, and mistake statute; for the provisions of that statute apply only to civil actions. *Tyler v. State*, 63 Vt. 300, 21 Atl. 611.

By section 17, in all civil causes before a justice where theretofore an appeal could be had to the county court, such appeal is to be taken to a municipal or city court, if there be such court within the county, or to the county court as now provided by law, except, etc. "The procedure in such cases shall be the same as is now provided by law in case of appeals to the county court." The language in the sentence quoted indicates that the words "procedure in such cases" have reference to the ordinary course to be followed in the cases themselves. They do not have reference to the extraordinary remedy had only by statute, and instituted not to govern the ordinary procedure in the action, but to enable a party to have the benefit of such procedure, of which, without fault on his part, he has been deprived by fraud, accident, or mistake.

By section 27 of the law of 1915, all acts and parts of acts inconsistent with that act are repealed as to all prosecutions and actions instituted after the act takes effect. We have already said enough to show that no inconsistency exists between the two statutes in the respect under consideration, and consequently the force and effect of the earlier, are not changed by the provisions of the later one.

Our attention is also called to section 297 of the charter of the City of Burlington. But that section contains nothing not already covered by our consideration of the case.

It may not be out of place to say that evidently the last Legislature took the same view of the matter, as expressed above; for in the new revision of the statutes, to take effect on February 1, 1918, the law of P. S. 2023, is so changed as to give the powers now held under it by county courts, to any court having jurisdiction of causes appealed from a justice. Laws of 1917, No. 254.

The pro forma judgment is affirmed.

HIRAM DROWN'S GUARDIAN v. GEORGE W. CHESLEY'S ESTATE.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

Receipts—When Open to Explanation or Contradiction by Parol Evidence—Construction—Burden of Proof—Accord and Satisfaction—What Constitutes—Questions for Jury—Infants—When Promise to Pay for Services is Implied.

Receipts not under seal, although written "in full settlement," are not contracts so as to be the exclusive evidence of the intention of the parties, but have the force of evidence of full payment and satisfaction sufficient to make a *prima facie* defence to the claim, and are always open to explanation or even to contradiction by parol evidence.

A receipt that embodies a contract between the parties cannot be modified or contradicted by parol evidence.

A writing, "Settled up to date with G. W. Chesley for all work, and put it in Barton bank the sum of two hundred dollars," held, a mere receipt and not a contract.

By producing a writing purporting to be a receipt for plaintiff's claim, defendant is not relieved of the ultimate burden of establishing an accord and satisfaction; the production of the writing and proof of its execution and delivery is sufficient to sustain the burden until plaintiff produces evidence tending to show that the money was not so received; and if there is evidence fairly and reasonably

tending to rebut defendant's case on this issue, the question is for the jury.

The payment and receipt of money upon an unliquidated claim does not constitute an accord and satisfaction, unless the offer of payment is accompanied by such acts and declarations as amount to a condition that if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that he takes it subject to such condition.

On the evidence, *held*, the question whether there had been an accord and satisfaction was for the jury.

Where an infant comes to live with one who stands in *loco parentis* to him, and remains as a member of the family after coming of age, performing such services as are ordinarily rendered by a child in the family, the law does not imply a promise to pay therefor, but if payment is claimed it must be shown that the services were performed with that expectation and that the recipient so understood or had sufficient cause to believe.

On the evidence, *held*, the question whether there was an implied promise to pay for plaintiff's services was for the jury.

Sessions v. Gilbert, Brayton 75, and *Raymond v. Roberts*, 2 Aikens 204, disregarded.

APPEAL from the disallowance of plaintiff's claim by commissioners upon the defendant estate. Answer, alleging an accord and satisfaction. Reply, a general denial. Trial by jury at the December Term, 1916, Caledonia County, *Butler, J.*, presiding. Verdict for plaintiff. Defendant excepted. The opinion states the case.

Simonds, Searles & Graves for defendant.

James B. Campbell and *David E. Porter* for plaintiff.

TAYLOR, J. This is an appeal from the disallowance of commissioners on the estate of George W. Chesley, formerly of Sheffield, deceased. Plaintiff is the guardian of one Hiram Drown, who was placed under guardianship after the services involved in this action were rendered. The trial in the county court was by jury and resulted in a verdict for the plaintiff. The only exception relied upon was taken by the defendant to the overruling of his motion for a directed verdict.

The principal issues raised by the motion (and the only grounds thereof that are briefed) were: (1) the effect of defendant's evidence introduced in support of his answer of accord and satisfaction, and (2) the sufficiency of plaintiff's evidence to support an implied promise to pay for the ward's services. Plaintiff's reply to defendant's answer of an accord and satisfaction was a general denial concluding to the country. As to the first ground of the motion defendant's claims are thus summarized in his brief: (1) Hiram Drown executed a written contract releasing his entire claim for wages. (2) This contract was never rescinded by the plaintiff, but was affirmed and ratified by him. (3) There was no evidence in the case tending to show any different understanding or agreement.

The evidence tended to show that when Drown was 16 years old he went to live with Mr. and Mrs. Chesley; that his father was dead and his mother poor; that he made his home with the Chesleys for about 18 years; that they furnished his board, clothing and spending money and in other respects treated him as a member of the family, but paid him no wages except as later appears; that while Drown was "mentally below par" he was physically strong and during all the time in question did the work of a hired man, filling a good man's place on a large farm.

Defendant's evidence of an accord and satisfaction tended to show that in April, 1915, some trouble arose between Drown and defendant's intestate; that the latter informed Drown that if he couldn't do "different" he wasn't going to keep him; that there was some talk about pay in which intestate told Drown that he would put \$200 in the bank for him, if it would be satisfactory, to which Drown assented; that accordingly intestate went to Barton and deposited \$200 in the bank there to Drown's credit; that at her husband's direction and while he was at Barton to make the deposit, Mrs. Chesley prepared and procured Drown's signature to the following writing, which was introduced in evidence: "April 5, 1915. Settled up to date with G. W. Chesley for all work and put it in Barton bank the sum of two hundred dollars. Hiram N. Drown;" that the writing was read to Drown, who said it was satisfactory, was then signed by him and left with Mrs. Chesley; that on intestate's return he handed Drown the bank deposit book. Defendant's evidence further tended to show that when intestate handed to Drown the bank book he told him he could stay if he would behave himself; that

if he stayed he would give him \$50 to put in the bank "when he went up in January"; that Drown stayed until January 1, 1916, and the \$50 was deposited to his credit as agreed.

Against defendant's objection that he had shown an accord and satisfaction which could not be impeached under the pleadings and the further objection "to any evidence offered to vary the terms of that receipt," Drown was permitted to testify that Mrs. Chesley showed him the paper and told him that it was a receipt; that he didn't know what it was—couldn't read and write; that she read it to him and as she read it he was to receive \$200 in Barton bank. In answer to the question, "Now, did she say anything to you about its being in settlement?" he replied, "I didn't understand it that way," and to the question, "Or read anything to you about its being a settlement?" his answer was, "No." In cross-examination witness said he couldn't tell but that Mrs. Chesley read all there was on the paper; and in answer to the question, "She handed you this paper and you signed it readily and willingly?" he replied, "I w'ant willingly. I thought I was going to get some more money."

Defendant says that the writing signed by Drown was a contract, amounting to a release of any claim for prior services; and that in the absence of fraud or mistake it could not be varied or contradicted by parol evidence. If this position is well taken, his claims to the motion must be sustained. If the writing should be construed as a contract it cannot be varied, controlled or contradicted by extrinsic evidence unless fraud or mistake in its procurement are both alleged and proved. *McGregor v. Bugbee*, 15 Vt. 734. Here there was no such allegation and plaintiff expressly disavowed any such claim both on the trial below and on the argument in this Court. Defendant relies, in support of the claim that the writing is a contract of settlement and as such is clear and specific, upon *Sessions v. Gilbert*, Brayton 75, and *Raymond v. Roberts*, 2 Aik. 204, 16 Am. Dec. 698, neither of which is any longer authority on the question at bar. Neither case has been expressly overruled, but both have been disregarded and their holdings repudiated. The statement to which the latter case is cited was not necessary to the decision and Judge Prentiss, in a brief concurring opinion, expressed no doubt but that parol testimony may be given to contradict a receipt. In *Burnap v. Partridge*, 3 Vt. 144, where the rule is

laid down that a receipt is only evidence of an acknowledgment and is liable to be contradicted or explained by other testimony, it is said, "This has been repeatedly decided, not only in the courts of this State but elsewhere." See, also, *Murdock v. Matthews*, Brayton 100.

Receipts not under seal are held in this State to be always open to explanation, and even to contradiction, by parol evidence. They are not contracts so as to be the exclusive evidence of the intention of the parties. *Hitt v. Slocum*, 37 Vt. 524; *Earle v. Wallingford*, 44 Vt. 367; *Bennett v. Flanagan*, 54 Vt. 549. Nor does the fact that the receipt is written "in full" or "in full settlement" affect the rule. Such receipts are held to have the force of evidence of full payment and satisfaction sufficient to make a *prima facie* defence to the claim, but as not having the conclusive effect of a written contract. *Page v. Perno*, 10 Vt. 491; *Stephens v. Thompson*, 28 Vt. 77; *Guyette v. Bolton*, 46 Vt. 228; *Ashley v. Hendee*, 56 Vt. 209. See note to *Dodge v. Billings*, 2 D. Chip. 26 (Vt. Repts. Ann. Ed.).

A distinction is made in the cases between writings, however formal or informal, that are simply an acknowledgment of payment and receipts that embody an agreement between the parties. The former are regarded as *prima facie* admissions and not within the meaning of the parol evidence rule; while as to the latter, like other contractual writings, the rule of exclusion intervenes. See 5 Chamb. on Ev. § 3552; *Randall v. Kelsey*, 46 Vt. 158. The case last cited involved a receipt in full for services as administrator and cash paid out. It was held that the receipt did not preclude other evidence of the purpose for which it was given, as it did not constitute or import a contract as to anything thereafter to be done nor purport to cover any future transaction.

The true test is, does the writing which Drown signed embody a contract, or is it merely a receipt in full for his work? Clearly it falls in the latter class. As said in *Randall v. Kelsey*, it does not constitute or import a contract as to anything thereafter to be done. It mentions no future transaction. In short it is no more than the recital of a consummated transaction and wants the essentials of a contract. Defendant says that by it Drown impliedly agreed to release his claim for wages. But this no more so than in an ordinary case of a receipt in full settlement; besides it was held in *Winn v. Chamberlin*, 32 Vt. 318,

that the character of a receipt was not altered by an express agreement to release the settled claim. This case is full authority for the holding that this writing is a mere receipt and not a contract. See, also, *Earle v. Wallingford*, *Bennett v. Flanagan*, and *Hitt v. Slocum*, *supra*; *McLane v. Johnson*, 59 Vt. 237, 9 Atl. 837. It is unnecessary to cite cases from other jurisdictions, but in *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113, will be found an illuminating discussion of this question. Many of the cases are collected in notes to 10 R. C. L. 1025, and 5 Chamb. on Ev. § 3552.

This holding disposes of defendant's claim that the writing was conclusive evidence of an accord and satisfaction. It is said that the "release" given by Drown is a bar to plaintiff's claim because he did not rescind the settlement and return the consideration thereof, but on the contrary ratified the accord and satisfaction by retaining the money deposited. This assumes that an accord and satisfaction was conclusively established by the writing, which we have seen was not so. The cases cited by the defendant to this proposition relate to a rescission of a contract, or a settlement, for fraud, while here plaintiff is not relying upon rescission of an accord and satisfaction, but insists that there was no accord, without which there could be no ratification. These were questions for the jury, if the evidence warranted their submission.

But the defendant says that plaintiff's evidence was insufficient to rebut the probative force of the "release" and to warrant the jury in finding that Drown did not intend to release his claim. Defendant argues this point with the correct rule as to effect of receipts in full in mind, but apparently misconceives the effect of the *prima facie* defence on the question of burden of proof. The defendant is not thereby relieved of the ultimate burden of establishing an accord and satisfaction. The production of the writing and the proof of its execution and delivery was sufficient to sustain this burden unless and until the plaintiff produced evidence tending to show that the deposit was not received in satisfaction of an accord. But at no time does the burden of proof on this issue shift to the plaintiff. *Rutland Railway etc. Co. v. Williams*, 90 Vt. 276, 98 Atl. 85, and cases cited. It follows that if there was evidence fairly and reasonably tending to rebut defendant's *prima facie* case on this issue,

the weight of the evidence and the disposition of the issue made by it were questions for the jury.

The payment and receipt of money upon an unliquidated claim will not operate as a settlement although the debtor so intended it and would not have paid it if he had not understood that such would be its effect, but in reference to which he made no such condition, if the creditor did not so understand it and would not have received it upon such an understanding. *Brigham v. Dana*, 29 Vt. 1. To constitute an accord and satisfaction of such a claim it is necessary that the offer be accompanied by such acts and declarations as amount to a condition that if the money is accepted it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that he takes it subject to such condition. *Preston v. Grant*, 34 Vt. 203; *Van Dyke v. Wilder & Co.*, 66 Vt. 579, 29 Atl. 1016. Then, if the creditor receives the money, he takes it clogged with the condition that the other party attached to it, and it operates as a satisfaction of the claim notwithstanding the creditor does not intend it to have such effect. *Connecticut River Lumber Co. v. Brown*, 68 Vt. 239, 35 Atl. 56; *Murphy v. Little*, 69 Vt. 261, 37 Atl. 968. See also, *Bianchi Granite Co. v. Terre Haute Monument Co.*, 91 Vt. 177, 99 Atl. 875. We think that Drown's testimony relating to the claimed settlement viewed in the light of all the circumstances was sufficient to carry the case to the jury. While his answers in direct and cross-examination were in part conflicting, the fair import of his testimony was that he did not understand that the \$200 was all that he was to receive for his work. Considering his mental inferiority and the grossly inadequate compensation offered for 18 years of service, measured even by the intestate's own estimate of its value in fixing future wages, we cannot say that the jury would not be justified in finding, as they evidently did, that he did not in fact understand and in the circumstances was not bound to understand that he was receiving the deposit in full settlement.

It is further urged as a reason why defendant's motion should have been sustained that on all the evidence Drown lived with and worked for defendant's intestate under such circumstances that no promise to pay for his services could be implied. There was no evidence of an express promise to pay wages prior to April 5, 1915, but plaintiff relied upon a promise to be implied from the circumstances. As a general proposition when one

party has rendered to another valuable service, without an express agreement to pay therefor, a promise to pay will be implied. *Lunay v. Vantyne*, 40 Vt. 501. However, this rule has its exceptions. If a child, after becoming of age, remains in the parent's service, performing such services as are ordinarily rendered by a child in the family, the law will not imply a promise to pay therefor, the reason sometimes assigned being that merely continuing to reside at home and to labor as before creates no natural presumption that the child has assumed the relation of servant. In such case, if the child would claim payment for services, it is incumbent upon him to show that they were performed with the expectation at the time that he would be paid therefor and that the parent so understood or had sufficient reason to believe. *Fitch v. Peckham*, 16 Vt. 150. The same rule applies where an infant comes to live with one who stands in *loco parentis* to him, *Ormsby v. Rhoades*, 59 Vt. 505, 10 Atl. 722; and also where, in such case, the child after coming of age remains as a member of the family, *Andrus v. Foster*, 17 Vt. 556. It is said in the case last cited that the right to compensation in such cases must depend upon the circumstances of the particular case.

Assuming as the defendant contends (which perhaps the evidence fairly tended to show) that young Drown was taken into the Chesley home and treated as a member of the family, still the case was for the jury on the question of an implied promise to pay for his services. Plaintiff would make a case on this issue if the services were performed under circumstances that justified an expectation on the part of both parties that there was to be pecuniary compensation. *Andrus v. Foster*, *supra*. To say nothing of evidence of certain declarations of intestate capable of being construed as admissions, the length of time that Drown worked after coming of age, some 13 years; the amount and kind of work performed; the fact that intestate in effect discharged him, at the same time having a talk with him about "pay" in which he offered to put \$200 in the bank for him; and finally the fact that he paid him for "work" and took a receipt in settlement therefor, all clearly tended to show an understanding on intestate's part that there was to be pecuniary compensation for some part of the services at least. As to Drown's understanding there was direct evidence that he expected such compensation. These facts were sufficient to rebut the presumption,

if it exists in this case, that Drown had not assumed the relation of a servant on reaching his majority. We fail to find that the court erred in overruling the motion.

Judgment affirmed; to be certified to the probate court.

IDA MAE BEAULAC v. L. S. ROBIE AND PEARL SLAYTON.

January Term, 1917.

Present: MUNSON, C. J., WATSON, HASELTON, POWERS, and TAYLOR, JJ.

Opinion filed October 2, 1917.

Evidence—Repairs After Accident—When Admissible—Joint and Several Liability in Action of Tort—Landlord and Tenant—Liability to Third Persons for Defective Premises—Joint Recovery—When Not Allowed—Damages—When Not Supported by Evidence.

Evidence of repairs made by the owner of the premises to a trap door through which plaintiff had fallen was admissible, as tending to show, in connection with other evidence, that the owner and not the tenant was in control and was responsible for plaintiff's injuries.

Two defendants, jointly charged in an action in tort, can be held jointly or severally liable, as the evidence warrants, and plaintiff cannot be compelled to elect against which defendant he will proceed.

Persons who claim damages on the ground that they are invited into a dangerous place in which they receive injuries must seek their remedy against the person who invited them, and there is nothing in the relation of landlord and tenant which changes this rule.

As between landlord and tenant, it is the duty of the latter in the first instance, to see that the premises occupied by him are safe for those coming there by his invitation, express or implied, and persons injured must seek redress from the tenant and not from the landlord.

Where there is no agreement by a landlord to make repairs, he is not liable for an injury to third persons due to a defective condition

of the premises arising subsequent to the letting and while the premises are out of his control and possession; but if the landlord retains portions of the leased premises under his control, the responsibility for injuries to persons rightfully there is his and not the tenant's.

A joint recovery for injuries received by the plaintiff due to the defective condition of a trap door in a platform in front of a store cannot be had against the owner of the premises and the tenant in the absence of evidence that the platform was under their joint control.

In an action of tort for personal injuries, it is error to submit to the jury the question of the plaintiff's loss of earnings, there being no evidence as to what her earning capacity had been, nor as to what she had previously received as wages, it appearing only that she was a piano player and that she had worked during the year before the accident, but not in what capacity.

TORT FOR NEGLIGENCE. Plea, the general issue. Trial by jury at the June Term, 1916, Caledonia County, *Waterman, J.*, presiding. Verdict for plaintiff. Defendant excepted. The opinion states the case.

Porter, Witters & Harvey; and *John W. Redmond* for defendants.

Both the defendants cannot be held. It was either the duty of the landlord to make the repairs, or the duty of the tenant to make them. There was no evidence of a joint duty in that respect. If the duty rests upon the tenant, the landlord is not liable; if upon the landlord, the tenant is not liable. *Texas Loan Agency v. Fleming*, 44 L. R. A. 279; *Fisher v. Thirkell*, 4 Am. Rep. 422; *Ahern v. Steel*, 115 N. Y. 216; *Burdick v. Cheadle*, 20 Am. Rep. 771; *Mellen v. Morrill*, 30 Am. Rep. 695; *McLean v. Fiske Wharf etc. Co.*, 158 Mass. 472; *Duffin v. Dawson*, 61 Atl. 76; *Adams v. Fletcher*, 33 Am. St. Rep. 859; *Sheets v. Selden et al.*, 74 U. S. 416, 19 L. ed. 166; *Jones on Landlord & Tenant*, 598-604; 1 *Tiffany*, *Modern Law of Real Property*, pp. 102-105; 18 Am. & Eng. Enc. 238; 24 Cyc. 1124; *Woodfall, Landlord & Tenant*, (13 ed.) 735; *Shearman & Redfield on Neg.*, Sec. 503.

McFeeters & McFeeters, and Robert W. Simonds for plaintiff.

TAYLOR, J. This is an action for personal injuries received by the plaintiff on premises owned by defendant Robie and occupied in part by defendant Slayton. There was trial by jury with verdict and judgment against both defendants, who reserved joint and several exceptions.

Robie was the owner of two connected buildings, one of which he occupied as a grist mill, while he rented the other to two tenants, an upstairs tenement to one Chaffee and a store on the ground floor to Slayton. Plaintiff's accident occurred on a platform in front of the store rented by Slayton. There were platforms in front of and attached to the two buildings, that in front of the store being one step higher than the mill platform. Slayton occupied under a verbal lease, in which no mention was made of the store platform, and nothing was said as to who should make repairs on the premises. The platform was used by Slayton for receiving and storing goods and by his customers in entering the store. It was used by customers of both Slayton and Robie in going from one place of business to the other and by both defendants in passing back and forth between their places of business. At the time Robie leased to Slayton there was a trap door in the platform furnishing access to a cellar window beneath. The lease to Chaffee was subsequent to that to Slayton. His lease included the tenement upstairs and room in the cellar under the store for wood and coal and gave him the right of access to the cellar through the trap door in the platform. Chaffee occasionally used the trap door to put wood into the cellar, and was the only one who had occasion to use it. Slayton occupied no part of the cellar under his store. Robie testified that he had no occasion to use the platform after his lease to Slayton and made no use of it except to cross it occasionally in going to Slayton's store.

When Chaffee went into possession of the upstairs tenement the trap door consisted of three boards securely fastened together by cleats, and no question was made but that in this condition it was perfectly safe. Later, and several months before plaintiff's accident, Chaffee requested one Dunbar, Robie's miller, to separate the boards so they could be removed singly. In response to this request Dunbar sawed through the cleats, thereby separa-

ting the boards. There was no evidence tending to show that in doing this Dunbar was acting within the duties of his employment. It was done without Robie's knowledge or subsequent approval. There was no evidence that Robie knew that the trap door had been changed until after plaintiff's accident. Slayton admitted knowing of it for about six months before the accident and testified that he kept watch of the platform because he knew it would be dangerous if the boards got out of place. Plaintiff's evidence tended to show that her injury was occasioned by stepping upon one of the boards which had become displaced and gave way under her weight, precipitating her into the hole through the platform. The accident happened as she was going into Slayton's store to purchase goods.

The following evidence in substance was received under defendants' exception: Soon after the accident Dunbar, of his own notion, fixed the trap door to make it safe. Robie was absent at the time Dunbar started on this work but came to the mill while the work was progressing and made no objection. The work was done "on Robie's time," as he made no reduction from Dunbar's weekly pay on account of the time thus employed. The ground of objection was that repairs after the accident were immaterial in any view of the case. The evidence was received not to show negligence, but as tending to show that Robie and not Slayton was in control of the platform and responsible for its unsafe condition. As the case stood it was material to show which defendant was responsible for the platform being out of repair; and evidence that Robie subsequently, and while the terms of the lease remained the same, made repairs on it, would, in the circumstances, have some tendency to show that he retained control of it. Evidence of a single instance of repairs standing alone might not be sufficient evidence of control. See *McLean v. Fiske Wharf and Warehouse Co.*, 158 Mass. 472, 33 N. E. 499. But it was for the jury to say on the evidence whether Robie made the repairs his own by ratifying Dunbar's action. If they found that the repairs were in effect made by Robie, this fact in connection with the evidence that no mention of the platform was made in the lease to Slayton and the further evidence that Robie gave subsequent permission to Chaffee to use the trap door without consulting Slayton, taken in connection with the fact that at the time the store was leased he retained possession of the cellar to which the door furnished access, made

a case for the jury whether Robie did in fact retain possession of and exercise control over the platform. Our cases, including *Place v. Grand Trunk Ry. Co.*, 82 Vt. 42, 71 Atl. 836, cited by the defendants, are not to the contrary. They go no further than to hold that subsequent repairs are not admissible to show negligence.

At the close of the plaintiff's evidence the defendants moved that she be required to elect which defendant she would proceed against and excepted to the action of the court in overruling the motion. This was not error. The defendants were jointly charged with the tort and could be held jointly or severally liable as the evidence warranted when the case should go to the jury. See *Wright v. Cooper et al.*, 1 Tyler 425; *Moulton v. Moore*, 56 Vt. 700.

At the close of the plaintiff's evidence, and again at the close of all the evidence defendant Robie moved for a directed verdict on several grounds, which can be summarized as that there was no evidence in the case tending to show actionable negligence on his part, and excepted to the action of the court in overruling his motion. It was urged in support of this motion that there was no evidence tending to show a duty owed by defendant Robie to the plaintiff nor any shortage of duty; that on all the evidence Robie had let the store to which the platform was appurtenant to Slayton and had parted with his right to make repairs upon it; and that he was not liable for failure to keep the platform in repair while in the control of Slayton under the lease. For convenience we consider the exception in connection with an exception to the charge.

The court charged the jury that if each defendant was negligent and their negligence combined to cause plaintiff's injury, they could be held jointly liable. The defendants excepted on the ground that there was no evidence ending to show joint liability. The plaintiff relies upon the rule that where the negligence of two or more persons concur in producing a single injury, such persons are jointly liable, although there is no common duty, common design or concert of action. She urges in support of the charge that Robie owed a duty to the plaintiff as part of the general public, whom he knew or ought to have known would use the platform; that Slayton owed a duty to her as a customer; and that each failed in his duty, producing a single injury.

The evidence of the use of the platform by the public was that there was no side walk on that side of the street and that sometimes persons passing in the street would cross the platform. Robie testified on this subject that a few times in the spring when the street was muddy he had seen passers-by cross the platform to avoid the mud, and that he did not forbid such use though he supposed he had a right to do so. If this evidence was sufficient to raise a duty on the part of Robie toward travelers in the highway, which we do not decide, it cannot avail the plaintiff as she was not there in the claimed right of the public but at the invitation of Slayton. On the case presented the measure of Robie's duty to the plaintiff was that of an invitee of Slayton. It remains to consider whether in any aspect of the case the defendants were jointly liable.

Negligence can only spring from unperformed duty; so in actions therefor, it is of primary importance to inquire whether the alleged duty is owed by the defendant to the plaintiff. Liability for an injury due to defective premises ordinarily depends upon power to prevent the injury by making repairs and therefor rests primarily upon him who has control and possession of the premises. In the absence of agreement the landlord is not bound to make repairs. See *Brown v. Burrington*, 36 Vt. 40.

It is a well-settled general rule that persons who claim damages on the ground that they are invited into a dangerous place in which they receive injuries must seek their remedy against the person who invited them, and there is nothing in the relation of the landlord and tenant which changes this rule. Thus, as between landlord and tenant, it is the duty of the latter, in the first instance, to see that the premises occupied by him are safe for those coming there by his invitation, express or implied; and persons injured must seek redress from the tenant and not from the landlord. A tenant having entire control of the premises is, so far as third persons are concerned, deemed the owner. He is *prima facie* liable for injuries to others occasioned by neglect to keep the premises in repair. 16 R. C. L. 1095-1097.

Whatever the rule may be in case the landlord has covenanted to make repairs, where there is no such agreement it is well settled that the landlord is not liable for an injury to third persons due to a defective condition of the premises arising subsequent to the letting and while the premises are out of his con-

trol and possession. See *Blood v. Spaulding*, 57 Vt. 422; 16 R. C. L. 1063; 3 Shearman & Redfield, Neg. § 708.

But it is equally well settled that if the landlord while renting premises retains portions thereof under his control the responsibility for injuries to persons rightfully there is his and not the tenants. He is liable not in his character as lessor but as owner and occupant. He owes a duty to his tenants and those on the premises at their invitation to keep such undemised parts reasonably safe. 16 R. C. L. 1072; *Readman v. Conway*, 126 Mass. 374; *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293; *Shoninger Co. v. Mann*, 219 Ill. 242, 76 N. E. 354, 3 L. R. A. (N. S.) 1097; 3 Shearman & Redfield on Neg. § 710.

These general propositions are supported by the cases cited in the briefs and by many others not cited. Indeed, they are too well recognized to require extended citation of authorities.

Applying these principles it is evident that a joint recovery could not be had on the evidence in this case. If the platform was included in the premises leased by Slayton and so passed into his sole control, Robie would not be liable; but if the platform remained in Robie's control and possession, Slayton would not be liable. The case is barren of facts showing joint liability, as to which see *Drown v. N. E. Tel. & Tel. Co. et al.*, 80 Vt. 1, 11, 66 Atl. 801. It was therefore error to submit that question to the jury.

The motion for a directed verdict was properly overruled. As we have seen, direct evidence was not necessary to show that Robie retained control of the platform, but the fact may be inferred from the circumstances. On all the evidence the question was for the jury under proper instructions.

Defendants have briefed certain other exceptions to the charge, but they do not require special notice. So far as the questions raised are liable to arise on a new trial they are sufficiently covered by what we have already said. They also brief certain exceptions saved to argument of counsel; but it is not at all probable that the same questions will arise on the retrial and it would be unprofitable to examine them.

The defendants excepted to the submission of plaintiff's wages as an element of damages on the ground that there was no evidence as to what her earning capacity had been nor as to what she had received as wages in any employment. The court told the jury that there was no evidence as to the wages

she had been earning or was capable of earning but permitted them to estimate her damages in that regard on the evidence showing the nature of the employment she had been engaged in. The extent of the evidence thus referred to was plaintiff's statement, in answer to the question whether before the time of the accident she had any particular occupation, that she was a piano player and the further statement that the year before she was hurt she worked for Mr. Robie, but in what capacity did not appear. It is enough to say that this evidence was wholly inadequate to afford the basis of such an inference as plaintiff contends the jury were entitled to draw. The manifest shortage of evidence can readily be supplied on retrial which renders further discussion of the question unnecessary.

Reversed and remanded.

TOWN OF GLOVER v. TOWN OF GREENSBORO.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

Paupers—Domicile—Residence—Change of—Question of Fact.

To constitute domicile, the fact of residence and the intent to make the place of residence the home of the party must concur; and so, to effect a change of domicile, there must be an actual removal or change of residence, without the intention of going back.

The question of the change of residence by an alleged pauper is one of fact to be determined on all the evidence as to the intent with which the change was made, combined with that bearing upon the actual removal.

Under the evidence, *held*, that the finding of the referee as to the domicile of the alleged pauper was supported by the evidence, and was not inconsistent with other findings in the case.

ASSUMPSIT to recover for expenditures in the support of a pauper. Plea, the general issue. Heard in vacation after the September Term, 1916, Orleans County, *Stanton, J.*, presiding.

STATEMENT BY WATSON, C. J. This case was heard below on a referee's report and defendant's exceptions thereto. The exceptions were overruled and judgment rendered for the plaintiff to recover the amount found to have been expended by it in the support of the pauper, L. G. Bush and his wife. Defendant excepted to the judgment.

The evidence taken before the referee, in respect of the intent of the alleged pauper as to residence, is made a part of the report, solely on that question. The ultimate issue was whether the pauper last resided in the defendant town for the space of three years, supporting himself and family, as was necessary by statute (P. S. 3667), in order to the plaintiff's right of recovery for the assistance rendered. The assistance was furnished by the plaintiff town, part in February, 1914, and part in April, 1914, when Bush was a resident therein, was poor, and in need thereof.

At all times mentioned in the findings, Bush had a wife whose needs and poverty increased or were relieved, according as her husband's poverty and means were increased or relieved, and who shared with him in the benefit of the assistance furnished. Bush and his wife went to defendant town as early as January, 1908, and immediately took up a residence therein, moving upon and occupying a farm, keeping house, supporting themselves, and never received any assistance from the town while either remained therein. In October, 1910, they moved from this farm, taking with them their household goods, storing them in an old building in the town, belonging to one Carl Thompson (whose wife is a cousin of Mrs. Bush), after which Bush and his wife did not keep house in that town. From the time last mentioned until the following April, Mrs. Bush remained with her said cousin for the most part, but visited occasionally among neighbors living in the same town, and continuously resided in that town from January 31, 1908, until April, 1911. Mr. Bush also resided continuously therein, from January 31, 1908, except as stated below.

Immediately after leaving the farm as stated above, Mr. Bush made a visit to Derby, remaining about a week, and returning to defendant town where he and his wife continued to visit

with the Thompsons until after the following January, during which time Bush and his wife helped the Thompsons a bit, and during which time Bush worked out to some extent in the town; but otherwise neither he nor his wife paid the Thompsons anything for their support, nor did the Thompsons pay them or either of them anything for their assistance. Mrs. Thompson tired of the presence of Mr. Bush as a guest and finally told him to get out, that she had had him there as long as she wanted him. The referee states that he is unable to find that Bush left the Thompsons by reason of the inhospitable suggestion of Mrs. Thompson; but thereafter, pursuant to a previous contract of hiring, Bush, on the first day of January, 1911, went to the plaintiff town to work for one William Graham, leaving his wife at the Thompsons in the defendant town. Bush remained in Glover in the employ of Graham until February 1, 1911, when he completed his work there, but by reason of a heavy snowstorm remained a few days longer, after which he returned to the Thompsons', where he stayed a day or so with his wife. From that time on until his final removal from defendant town as mentioned below, the referee states that he is unable to find where Bush kept himself, but he was at the Thompsons' only a small portion of the period.

In the following April (1911) Bush and his wife, taking their household effects from the old building where stored as stated above, moved from defendant town to plaintiff town, and have ever since remained there. After such removal and prior to March, 1913, the overseer of the poor of the latter town had occasion to help them, and on February 27, 1914, sent notice to the overseer of the poor of defendant town, in accordance with the provisions of section 3667 of the Public Statutes, concerning which no question is made. The assistance for which recovery is here sought, was rendered after the giving of such notice.

The referee finds that prior to such removal in April, 1911, Bush had been thinking of so doing, and had been thinking of permanently leaving Greensboro, but was unable to find that he ever definitely determined permanently to abandon that town and take up his residence elsewhere until at the time of his removal with his wife in the month last mentioned. His leaving that town on previous occasions is found to have been at most but temporary absences, and his residence there is found to have continued from the 31st day of January, 1908, until April, 1911.

Defendant excepted to the finding last stated, as not supported by the evidence, and as inconsistent with the other facts found, especially that: "When he (Bush) left defendant town and went to plaintiff town January 1, 1911, he went under an agreement to work for Graham two months, but as stated worked only one month, and while at said Graham's had no home in defendant town other than with the Thompsons, to whose place he could not return as a matter of right."

John W. Redmond for defendant.

Cook & Norton for plaintiff.

WATSON, C. J. There can be no doubt, on the facts found, that the alleged poor person was a resident of the town of Greensboro from January 31, 1908, to January 1, 1911, supporting himself and family, within the meaning of the law. The real question is, whether on the day last named, when he went to the town of Glover to work for Graham under a contract of hire, he changed his residence to that town. If he did, his continuous residence in Greensboro was thirty days short of three years, the time essential to the latter's liability. But if he did not, then he last resided in that town for the space of three years, supporting himself and family, and a recovery can be had for the assistance furnished.

The intention of a person in respect of making a change in his place of residence is important to consider; but it is not alone determinative of the fact of effecting the change. Domicile is not a thing resting wholly in intention, and residence is a fact. *Jamaica v. Townshend*, 19 Vt. 267; *South Burlington v. Worcester*, 67 Vt. 411, 31 Atl. 891. The person's purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and the intent must concur. He must remove without the intention of going back. *Mount Holly v. Plymouth*, 89 Vt. 301, 95 Atl. 572. To constitute domicile, the fact of residence and the intent to make the place of residence the home of the party must concur. *Fulham v. Howe*, 62 Vt. 386, 20 Atl. 101.

The question of the change of residence in the case before us was to be determined on all the evidence as to intent, combined with that bearing on the actual removal. We think the

finding of the referee to which exception was taken, was amply supported by the evidence, and is not justly subject to the criticism made. Nor is such finding inconsistent with the other findings quoted in the exception, that while working for Graham in plaintiff town, Bush "had no home in defendant town other than with Thompson, to whose place he could not return as a matter of right." One element of the finding objected to being that the occasions when Bush was away from the latter town previous to moving away with his wife in April, 1911, "were at most but temporary absences," there is not even color of inconsistency between the two findings, for he had not abandoned that town as the place of his residence. *Mount Holly v. Plymouth*, cited above. The exception is not sustained in either respect.

The exceptions saved in connection with the admission and use of evidence, have not been briefed.

Judgment affirmed.

TOWN OF MOUNT HOLLY v. TOWN OF CAVENDISH.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

Paupers — Residence — Trial — Requests for Findings — When Properly Refused.

A finding, when warranted by the evidence, that a pauper last resided for the space of three consecutive years in a certain town, supporting himself, determines the liability of that town for his support.

Requests for findings of fact which relate to matters of evidence, solely for the consideration of the court, are properly refused.

ASSUMPSIT, under P. S. 3667, to recover money expended in the support of a pauper. Plea, the general issue. Trial by

court at the September Term, 1916, Rutland County, Butler, J., presiding. Judgment, on facts found by the court, for plaintiff. Defendant excepted. The opinion states the case.

Sanford E. Emery for defendant.

C. L. Howe and Lawrence, Lawrence & Stafford for plaintiff.

WATSON, C. J. The plaintiff seeks to recover for money expended in the relief and support of Jabez W. Morgan, a single and poor person, who became in need of assistance while residing therein, subsequent to October, 1909. It was conceded that he was a poor person in need of assistance, and that the plaintiff town rightfully furnished such necessary relief to the amount of \$718.50, up to and including November 5, 1916; that the plaintiff gave due notice to the defendant, and it is entitled to recover that sum if Morgan was legally chargeable to the defendant town.

It is found that on October 18, 1909, Morgan moved from the town of Cavendish, taking his things, to the town of Mount Holly where he has since resided, not having lived in Cavendish since that date; and that he last resided for the space of three consecutive years, supporting himself, in Cavendish.

Defendant excepted to the last foregoing finding, and to the finding that Morgan formed no fixed intention to change his home from that town to the plaintiff town until the date last named, as not supported by the evidence. But a careful examination of the evidence shows that these findings were warranted, and they are determinative of the case. *Mount Holly v. Plymouth*, 89 Vt. 301, 95 Atl. 572.

The defendant made sixteen requests for findings, and excepted to the court's failure to comply therewith. In its brief, defendant relies upon numbers 2, 4, 6, 7, 8, 9, 14 and 16. All of these, except the 14th, in fact relate to matters of evidence, solely for the consideration of the court, and were properly refused.

A finding was made touching the subject-matter of the 14th request, namely, when Morgan first formed a fixed intention to change his home from the defendant town. We have already disposed of this question.

Judgment affirmed.

FRANK C. PHELPS v. C. H. UTLEY.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

Alienation—Crim. Con.—When Wife is a Competent Witness in Husband's Behalf—Evidence—When not Admissible—Discretion of Court—Testimony Introduced after Party has Rested—When Delay Should be Granted—Petition for New Trial—When Meritorious.

In an action on the case for alienation and crim. con. the wife of the plaintiff is a competent witness in his behalf to tell the story of her *liaison* with the defendant.

It is error to permit a witness called by the plaintiff to testify to a conversation for the purpose of enabling him to fix a date, there being nothing said or done at the time that referred to the date or tended to fix it, and it not being suggested that the evidence was admissible on any other ground.

In an action on the case for alienation and crim. con. in which plaintiff's wife was a witness in his behalf, it was error to permit a witness called by plaintiff to testify that plaintiff's wife was pale and nervous and wept when interviewed prior to the trial regarding her improper relations with defendant, for the purpose of corroborating her testimony.

It is within the discretion of the trial court to allow a party to withdraw his rest and introduce further testimony; but where the testimony so introduced is of a new fact, not before in evidence, it is error to deny an application for delay to enable the opposing party to get witnesses with which to meet it.

A petition for new trial on the ground that defendant was given no opportunity to meet the testimony of a witness produced by plaintiff after the latter had rested, which he could otherwise have done, under the circumstances, *held*, meritorious.

TORT for criminal conversation, and alienation of the affections of plaintiff's wife. Plea, the general issue. Trial by jury at the September Term, 1916, Washington County, *Butler, J.*,

presiding. Verdict and judgment for the plaintiff. Defendant excepted.

While the case was pending on exceptions defendant brought a petition for a new trial on the ground of surprise, which was heard in Supreme Court on the petition and supporting affidavits. The opinion states the case.

Melvin G. Morse and *W. A. Dulton* for defendant.

J. Ward Carver and *F. L. Laird* for plaintiff.

POWERS, J. This is an action on the case for alienation and crim. con. Much of the evidence upon which the plaintiff relied to establish his case came from his wife, who was admitted as a witness subject to the defendant's exception. This was not error, for since the passage of P. S. 1592, the competency of the wife as a witness for her husband has been the rule, and her incompetency, the exception. *State v. Muzzy*, 87 Vt. 267, 88 Atl. 895. So, notwithstanding the earnest argument here made that this ought not to be so in a case like this, it is so, since the wife did not here testify against the husband at all, and it certainly cannot be said that the telling of the story of her *liaison* with the defendant involved a breach of marital confidence.

Emerson Hoyt, a witness for the plaintiff, testified that he saw Mrs. Phelps and the defendant riding together in the latter's automobile on October 20, 1915, and that soon after he met the defendant's wife and talked with her. Subject to the defendant's exception, he was allowed to state that this conversation with Mrs. Utley was in reference to the whereabouts of her husband. This testimony was admitted on the ground that it enabled the witness to fix the date of the occurrence. But it did not aid the witness in this way. There was nothing said or done that referred to the date or tended in any way to fix it. It is not suggested that it was admissible on any other ground, and it should have been excluded.

A. D. Kimball was one of the plaintiff's lawyers and was a witness in his behalf. He testified that he and the plaintiff went to Montpelier to consult a lawyer and have a suit brought; that this was on November 3, 1915, which was the day after one of the clandestine meetings between Mrs. Phelps and the defendant—as testified to by her; and that they had an interview with Mrs.

Phelps at her sister's house that day. Subject to defendant's exception, he was allowed to testify that on that occasion, Mrs. Phelps was "very pale and nervous, and broke down and cried a good deal."

It may be stated broadly that a litigant may prove any act, conduct or statement on the part of his adversary, which tends to corroborate the claim of the former or impeach that of the latter. But he cannot corroborate himself or his own witness by showing extrajudicial acts, conduct or statements having that tendency. He cannot show the sayings of his witness out of court to corroborate his testimony given in court. *Munson v. Hastings*, 12 Vt. 346, 36 Am. Dec. 345; *Gibbs v. Linsley*, 13 Vt. 208; *State v. Flint*, 60 Vt. 304, 12 Atl. 526; *Lavigne v. Lee*, 71 Vt. 167, 42 Atl. 1093; *State v. Turley*, 87 Vt. 163, 88 Atl. 562. This rule is subject to an exception as shown by *State v. Flint*, but it does not apply to the case in hand. So it would have been error to allow Kimball to testify that Mrs. Phelps then told her story just as she had in court. No more was it proper to show by the witness an act of Mrs. Phelps' consistent with, and so corroborative of her testimony. *Green v. State*, 96 Ala. 29, 11 So. 478. It was error to receive this testimony. If Mrs. Phelps' agitation on that occasion was of any evidentiary consequence whatever, it tended to show her guilt and so to corroborate her as a witness. It had no other value as evidence. But under the rule, her appearance of guilt was not admissible as evidence to sustain her or condemn the defendant. It was a purely self-serving circumstance.

Mrs. Phelps testified that she went to ride with the defendant in his automobile on the evening of October 16, 1912; that they started from Cabot and drove out on the Walden Depot road some three miles and did not return for two or three hours, and so forth. The defendant admitted that they went to ride that night, but insisted that they were away only fifteen or twenty minutes, that they went on an entirely different road, that they did not stop anywhere, and turned around without stopping at a place where he formerly had a millyard. The parties rested and the evidence closed on Saturday. The court then took a recess until the following Tuesday morning. When the court came in on Tuesday, the plaintiff asked leave to withdraw his rest, and to introduce one Fifield as a witness to show that the millyard above referred to was fenced on the roadside at the time referred to. To this the defendant objected on the ground

that if admitted this testimony would raise a new issue of fact; that he was taken by surprise, and that if it was admitted, he should be given an opportunity to meet it. This objection was overruled and the defendant excepted. Thereupon the witness took the stand and testified that the millyard in question was fenced on the roadside with a wire fence, which had stood there for about ten years. The defendant then asked for a delay of the trial that he might have time to get witnesses to meet this testimony. This request was denied and the defendant excepted.

It is perfectly apparent that it was of vital importance, so far as the defendant's version of the incident of October 16 was concerned, for him to show that this millyard was not fenced on that date. For if it was, he could not have turned around there as he stated. Standing uncontradicted, Fifield's testimony impeached the defendant and must have affected his standing as a witness. *Goodall v. Drew*, 85 Vt. 408, 82 Atl. 680. Opening the case to let Fifield in as a witness, was, of course, a matter of discretion. So far no error was committed. But opening the door to the plaintiff and closing it to the defendant was error. The witness stated a new fact not before in evidence. The first opportunity to meet this fact was when the witness finished. To deny the defendant's application deprived him of a substantial right and his exception is sustained. 38 Cyc. 1358; *Herrman v. Combs*, 119 Md. 41, 85 Atl. 1044; *Birmingham Ry. L. & Power Co. v. Saxon*, 179 Ala. 136, 59 So. 584; *Rock Island v. Starkey*, 189 Ill. 515, 59 N. E. 971; *Kent v. Lincoln*, 32 Vt. 591; 1 Chamb. Ev. § 383.

The defendant brings a petition for a new trial predicated the same on the facts and rulings referred to in the discussion of the exception last above treated. In support of this petition he makes it appear that he could have successfully met Fifield's testimony, if he had been given an opportunity so to do. It now sufficiently appears that Fifield was talking about one side of the highway and the defendant, the other. When the former spoke of the millyard, he referred to the land on the side where the mill was. When the latter spoke of it, he referred to the space on the opposite side of the road. It seems probable from a photograph before us that the road ran through the millyard, and that one side was as much yard as the other. It is likely that the

jury would take this view of the matter. The petition is meritorious and should be granted.

Judgment reversed and cause remanded. Petition for a new trial granted with costs to the petitioner.

W. T. RAWLEIGH COMPANY v. W. A. PIERCE, J. L. HAZEN AND J. D. HUNTLEY.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

New Trial—Newly Discovered Evidence—Reasonable Diligence—Surprise.

In a petition for new trial based upon newly discovered evidence, the petitioner must make it appear that the evidence rolled upon is, in fact, newly discovered, and that he could not with reasonable diligence have discovered and produced it at the trial.

Where defendants in an action brought upon an instrument of indemnity, purporting to be signed by them, pleaded the general issue with notice that they should deny their signatures, evidence introduced by them in support of the notice affords no basis for granting a new trial to plaintiff on the ground of surprise, no continuance or delay having been asked for by him.

A new trial on the ground of newly discovered evidence will not be granted where the facts alleged to be newly discovered were ascertained by the officers and agents of the petitioner corporation prior to the trial, while acting for it within the scope of their authority, and were pertinent to the matter then in hand, and so, by imputation, were known to the petitioner itself.

Where a plaintiff corporation has not secured the attendance at the trial of its officers and agents who are able to give evidence upon the issues raised by the defendants, and who had to do with the transaction involved in the suit, it cannot, in a petition for a new trial, claim that it has used due diligence in obtaining evidence.

PETITION for a new trial, on the ground of newly discovered evidence, and surprise. Heard at the May Term, 1917, Supreme Court, on petition, answer and depositions of witnesses.

The action was in contract and the trial below was by court at the December Term, 1915, Windsor County, *Miles*, J., presiding. Judgment for defendants. The plaintiff petitioned for a new trial. The opinion states the case.

Pingree & Pingree for petitioner.

The evidence which occasioned the surprise having been offered at the close of the trial, a new trial may be allowed although a continuance was not asked for. *Hemmenway v. Lincoln*, 82 Vt. 465; *Coolidge v. Taylor*, 79 Vt. 528; *Alger v. Merritt*, 16 Iowa 121; *Rodriguez v. Comstock*, 24 Cal. 85; *Felver v. Judd*, 81 Ill. App. 529; *Seligman v. Lewin*, 91 N. Y. Supp. 395; *Mut. Life Ins. Co. v. Perrish*, 66 Ark. 612; *Delmos v. Martin*, 39 Cal. 555; *Russell v. Reed*, 32 Minn. 45.

F. G. Bicknell and *Raymond Trainor* for petitionees.

If plaintiff was surprised, it should have applied for a continuance. Having chosen to proceed with the trial, it is bound by its election. *Hemmenway v. Lincoln*, 82 Vt. 465; *Taylor v. St. Clair*, 79 Vt. 536; *State v. White*, 70 Vt. 225; *Briggs v. Gleason et al.*, 27 Vt. 114; *State v. Sargood*, 80 Vt. 412.

Failure to attend the trial, solely by reason of inconvenience to itself, will not entitle the petitioner to a new trial. *Noyes v. Spaulding*, 29 Vt. 420; *Shephard et al. v. Hayes*, 16 Vt. 486; *Burr v. Palmer*, 23 Vt. 244.

The affidavits filed do not show due diligence on the part of the petitioner and the petition should be denied. *Picknell v. Fulton*, 89 Vt. 51; *Bradish v. State*, 35 Vt. 452; *Taft v. Taft*, 82 Vt. 64; *Reynolds v. Hassam*, 80 Vt. 501.

POWERS, J. The new trial here sought cannot be granted. It appears that the plaintiff, a non-resident corporation, brought a county court suit against the defendants therein seeking to recover on an instrument of indemnity purporting to be signed by them as guarantors of one Thompson. To that suit the defendants pleaded the general issue and gave notice under the rule that they should deny their signatures to the instrument

sued on. A trial was had by the court and judgment was for the defendants. At that trial the one important question was, did the defendants sign the contract in question? They admitted that they signed a paper at Thompson's request, but denied that it was the guaranty in suit or anything like it—insisting that it was a mere endorsement of Thompson's honesty, and that it had the word "Recommendation" printed across its top.

Properly construed the application here made is based upon newly discovered evidence. So far, then, as we need state the rule, the plaintiff must make it appear that the evidence relied upon is, in fact, newly discovered; and that it could not, with reasonable diligence, have discovered and produced it at the trial.

The plaintiff fails on both grounds. It deliberately chose to go to trial without being present by its officers and agents and without putting its counsel in possession of all the material facts within its knowledge. But it is said that its counsel was taken by surprise; that the claim that there was another paper was wholly unexpected, and that evidence can now be produced to refute this claim.

But the claim appeared in the early stages of the trial, during the examination of the very first witness, when it was unequivocally stated by defendant's counsel that the defence was that "it was another paper was signed there." The defendants had done all that they were required to do to appraise the plaintiff of their defence, by the notice above referred to. It was not necessary for them to go into details or recite the evidence on which they were to rely. The evidence in question may have been unexpected, but it affords no basis for granting a new trial on the ground of surprise.

Nor does it affect the question of diligence. Had the secretary of the plaintiff been present at the trial, this unexpected development could not have injuriously affected the plaintiff. No continuance or delay was asked for by the plaintiff, and the fact that counsel did not know of the evidence which the secretary could give does not affect the situation, since it was the plaintiff's fault that counsel were left thus uninformed. So far as surprise is involved, the case is within the spirit of *Hemmenway v. Lincoln*, 82 Vt. 465, 73 Atl. 1073.

Nor can it be said that the evidence relied upon is, in a proper sense, newly discovered. The plaintiff's secretary says

that no blank of the kind described by the defendants was in use by it or furnished to Thompson. The plaintiff's auditor and collector says that he called upon the defendants before the original suit was brought, showed them the guaranty, talked with them about their liability, and that they did not then deny their signatures. These facts, being ascertained by the officers and agents of the plaintiff while acting for it within the scope of their authority and being pertinent to the matters then in hand, became, by imputation, known to the plaintiff itself. 10 Cyc. 1054. See *Bank v. Brigg's Assignees*, 70 Vt. 594, 41 Atl. 586; *Roberts v. Hughes Co.*, 86 Vt. 76, 83 Atl. 807. It is the importance of this evidence and not the evidence itself that is newly discovered.

The situation in which the plaintiff finds itself is wholly due to its voluntary action in choosing to risk a trial without being present by such of its officers and agents as had to do with the transaction involved.

Stay vacated, and petition dismissed with costs.

GEORGE A. HUMPHREY v. O. A. WHEELER.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1918.

Constructive Possession by Officer—Attachment—Sufficiency of Return—Record—Evidence—Findings of Fact—Attachable Interest.

To give an officer constructive possession of property attached, it is necessary that it be described in the return with reasonable certainty, that is, that the property be therein sufficiently pointed out to enable the debtor, and those with whom he may deal, to be informed that it is attached. Hence the attachment of a less number of cows, and articles of personal property, than the defendant owned, with nothing to show which particular ones were attached creates no lien thereon.

The record of an attachment, required to be made by P. S. 1456, is public in character, and a duly certified copy is admissible in evidence.

A finding that a meat cart mentioned in an officer's return of attachment was sold conditionally to the defendant, and that at the time of the attachment and ever since, the conditional vendors had a valid vendors' lien thereon for the unpaid purchase money, more than the value of the cart, shows that defendant had no attachable interest therein.

A finding that a spring tooth harrow mentioned in an officer's return of attachment was sold conditionally to defendant, and that the vendor had, at the time of the attachment and ever since, a valid vendor's lien thereon for the full amount of the purchase price, is equivalent to a finding that the amount of the lien is all the harrow is worth, and the defendant had no attachable interest therein.

A return which names as attached "one spike tooth harrow," located in the town of Glover, with no further description or location given, is not sufficient to create an attachment lien thereon, in the absence of extrinsic evidence showing that the debtor had only the one harrow in the town named.

TORT FOR CONVERSION. Plea, the general issue. Trial by the Orleans County Municipal Court, *H. B. Cushman*, Judge. Judgment, on facts found by the court, for plaintiff. Defendant excepted.

The plaintiff was a constable and brought the action to recover for the alleged conversion of personal property, claimed to have been attached by him, on a writ placed in his hands for service and described in his return upon the writ. The opinion states the case.

Frank D. Thompson for defendant.

W. W. Reirden for plaintiff.

WATSON, C. J. The findings show that at the time of the attachment the defendant owned and had on his farm in Glover seven cows, fifty-two bunches of clapboards, several bushel baskets, several Fairbanks' platform scales, two hundred and eighty-seven cedar posts, and about three hundred bushels of potatoes. The attachment was of five cows, forty-two bunches of clapboards, one bushel basket, one Fairbanks' platform scales,

two hundred cedar posts, and one hundred and fifty bushels of potatoes. Applying the officer's return to the actual state of defendant's property, the attachment as to these articles or kinds of property cannot be maintained; for as to each, the defendant had more in number than were attached, and there is nothing showing which were attached, and therefore no lien was created thereon. To give the officer constructive possession of the property attached, it was necessary that it be described in the return with reasonable certainty. And such certainty requires that the property be sufficiently pointed out to enable the debtor, and those with whom he may deal, to be informed that it is attached. *Bucklin v. Crampton*, 20 Vt. 261; *Fullam v. Stearns*, 30 Vt. 443; *Pond v. Baker*, 55 Vt. 400; *Barron v. Smith*, 63 Vt. 121, 21 Atl. 269; *Stearns v. Silsby*, 74 Vt. 68, 52 Atl. 115.

The court received in evidence, subject to defendant's exception, a certified copy of the writ in the case of *Merriam & Son v. O. A. Wheeler*, and the officer's return thereon, lodged by the plaintiff in the town clerk's office in Glover, in making the attachment in question. The reception of this evidence was not error. When a copy of a writ of attachment upon which personal property is attached, is lodged in the office of the town clerk, such clerk is required by law to make a record thereof in a book kept for that purpose. P. S. 1456. The record thus required to be made, is public in character, and a duly certified copy is admissible in evidence. *Bond v. Campbell*, 56 Vt. 674; *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438; *Ripton v. Brandon*, 80 Vt. 234, 67 Atl. 541.

It is found that the meat cart mentioned in the return effecting the attachment, was sold conditionally to the defendant by Taplin and Rowell of Barton, this State, and at the time of the attachment they had and have ever since had, a valid vendor's lien on the same for unpaid purchase money, more in amount than the value of the meat cart. This shows that the defendant did not have at the time of the attachment, nor has he since had, any attachable interest therein.

It is also found that the spring tooth harrow mentioned in the return was sold conditionally to the defendant by F. S. Hitcher of Barton, and at the time of the attachment the latter had and has ever since had, a valid vendor's lien on the same for the full amount of the purchase price. While this finding is not in terms that the amount of the lien is all the harrow is

worth, it is equivalent to that, for it is inconceivable that an implement of agriculture in use on a farm, appreciates in value. The defendant, therefore, had no attachable interest in this harrow. Obviously this was the view of the plaintiff and the attaching creditors, for in this instance as well as in that of the meat cart, neither of them ever paid or tendered to the vendor the amount due on the lien.

The return names as attached "one spike tooth harrow," but it gives no other description of it, nor is its location given more definitely than in the town of Glover. No evidence was offered as to whether the defendant had more than one such harrow in that town at the time of the attachment. In this respect the return was like that relating to the hemlock bark in the case of *West River Bank v. Gorham*, 38 Vt. 649, which was held to be too indefinite as to the location of the property to effect any attachment thereon. Again in *Stearns v. Silsby*, cited above, it was held that such a return, supplemented by extrinsic evidence showing that the debtor had only the two horses and surrey sued for, in the town in which the attachment was made, was sufficient. There the court discussed the distinction at some length, and made plain the essentiality of such supplemental showing, in order to give reasonable certainty to the description of the property in such a return. It follows that the return as to the spike tooth harrow, was not sufficient to create any lien thereon.

The foregoing being determinative of the case, no other question raised by the defendant is considered.

Judgment reversed, and judgment for the defendant to recover his costs.

STATE v. EUSEBIO ALBANO.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

*Assault—Right of Self-defence—Evidence—When Inadmissible
—Request to Charge—When Refusal not Error—Verdict—
When Rendered for Lesser Offence than that Charged—
When a Bar to Prosecution for Another Offence.*

It a party assaulted has other means of avoiding the assault that are available, and that appear to him at the time as sufficient, he cannot use force in self-defence.

An exception to the exclusion of evidence offered by respondent upon the issue of self-defence, in a prosecution for assault with intent to kill, will not be sustained where there is no evidence in the case tending to show that respondent was assaulted or threatened with imminent and serious bodily injury and that he reasonably apprehended, in the circumstances of the case, that he needed to use the means which he did use in his defence.

Evidence offered by respondent in a prosecution for an assault with intent to kill that he was a steady worker was properly excluded, as having no tendency to contradict evidence introduced by the state that he occasionally drank intoxicating liquor.

Error cannot be predicated upon the failure of the trial court to charge as requested, when the record shows no evidence which would warrant the instruction so requested.

Under an indictment for an assault with intent to kill "being armed with a dangerous weapon," a verdict may be rendered of guilty of assault with intent to kill, or of a simple assault, if warranted by the evidence; because an indictment charging the highest degree includes the lower degrees.

Where one offence is a necessary element in, and constitutes a part of another, and both are in fact but one transaction, an acquittal or conviction of one is a bar to the prosecution for the other.

INDICTMENT for assault with intent to kill and murder, being armed with a dangerous weapon. Plea, not guilty. Trial by

jury at the September Term, 1916, Washington County, *Fish, J.*, presiding. Verdict guilty of assault with intent to kill. Respondent excepted.

It was claimed by respondent that the shooting was done by him in self-defence. As bearing upon the claim of self-defence, he offered to show that, prior to the assault, Cerutti, the complaining witness, was living as a boarder in the house with respondent's wife from whom respondent had parted; that before respondent left his home Cerutti accompanied respondent's wife to places of amusements and to houses of friends; that Cerutti had mistreated respondent's daughter and that respondent's wife communicated with respondent, and met him several times while Cerutti was away at work. This evidence was excluded, and respondent excepted.

J. Ward Carver for respondent.

Fred E. Gleason, State's Attorney, for the State.

The verdict should not be set aside. Where an indictment contains proper allegations to charge offences of less degrees than the highest charged, a conviction for any of the lesser is proper. 1 Bish. Cr. Proc., secs. 415-420; 1 Bish. Cr. Law, secs. 780, 794, 795; Wharton Cr. Pl. & Pr. (9th ed.) sec. 250; *Dickinson v. State*, 70 Ind. 247; *State v. Belden*, 33 Wis. 120; *Thomas v. People*, 113 Ill. 531; *People v. Dowling*, 84 N. Y. 478; *State v. Lessing*, 16 Minn. 75; *Com. v. Crowley*, 167 Mass. 434, 168 Mass. 222; *State v. Putnam*, 42 N. H. 490; *State v. Parker*, 66 Iowa 586; *State v. Lillie*, 60 Wash. 200; *State v. Henry*, 98 Me. 561; *State v. Smith*, 43 Vt. 324; *State v. Lincoln*, 50 Vt. 644; *State v. Locklin*, 59 Vt. 654.

MILES, J. This is a prosecution charging the respondent with assaulting one Cerutti with intent to kill and murder him, being armed with a dangerous weapon. On trial the respondent was found guilty and the case comes here upon exceptions to the exclusion of evidence, to the failure of the court to charge, to the overruling of the respondent's motion to set the verdict aside, and to the overruling of the respondent's motion in arrest of judgment. There was no question on the trial but that the respondent on the second day of July, 1916, fired at and wounded

Cerutti, and that the shooting was done with a thirty-eight caliber revolver, which, evidence of the State tended to prove, was purchased by the respondent on the 27th day of May, 1916.

The respondent claimed that the shooting was done in self-defence and the first eleven exceptions were to the exclusion of evidence which the respondent claimed supported that defence and those exceptions may well be treated together. Respondent's counsel makes no claim that the evidence excluded, standing alone, would be admissible, but he claims that the excluded testimony would shed light upon the character of the self-defence and hence would be admissible in connection with that defence. The position of the respondent, therefore, depends upon his claim of self-defence. The right of self-defence is founded in the first law of nature and as applied to human affairs, it presupposes that the party interposing the defence has been assaulted. 2 R. C. L. p. 548, par. 27 *et seq.* "The law abhors the use of force, either for attack or defence, and never permits its use unnecessarily," and if the party assaulted has other means of avoiding the assault that are available, and that appear to him at the time as sufficient, and are in fact available, then he cannot use force in his self-defence. *Howland v. Day & Dean*, 56 Vt. 318. To make the testimony excluded material, it was necessary that there should have been evidence in the case tending to show that the respondent was assaulted or threatened with imminent and serious bodily injury and that he reasonably apprehended, in the circumstances of the case, that he needed to use the means which he did use in his defence. *McQuiggan v. Ladd et al.*, 79 Vt. 90, 64 Atl. 503, 14 L. R. A. (N. S.) 689. A careful examination of the transcript discloses no evidence of such a character, but on the contrary, the uncontradicted testimony shows that respondent was not assaulted before the shooting but deliberately and without provocation, so far as anything appeared in the evidence, fired at Cerutti as soon as he came into his presence. Respondent's counsel claims that a mark upon the wall and the course the bullet took in passing through a portion of Cerutti's arm indicates that the shooting was done in self-defence. Counsel did not point out to us how this fact had a tendency to show that the respondent was assaulted, much less that it was done in such a manner as to justify him in reasonably apprehending that it was necessary to shoot Cerutti, and we think that fact is too shadowy to base upon it a claim of self-

defence. We think that there was no error in the exclusion of that testimony.

The respondent's counsel has considered exceptions 12 and 13 together as raising only one question and we consider it in the same manner. Exception 12 was to the exclusion of a question asked Jerome Valli which was as follows: "Q. And whether or not, Mr. Valli, he is a steady worker?" The personal pronoun "he" referred to the respondent. The respondent's counsel, in connection with this question, said that he offered to show that respondent was a good steady workman, always at work, and that he had the books in court for the purpose of showing that fact and that he offered this testimony for the purpose of contradicting the testimony of the State that he was a drinking man. The State had introduced testimony tending to show, at the time of the shooting, the respondent was under the influence of intoxicating liquor to some extent, and in connection with that testimony, gave evidence tending to show that previously he had been in the habit of occasionally drinking intoxicating liquor, as bearing upon the question of whether he was under the influence of intoxicating liquor at the time of the shooting. We think that the offered testimony had no tendency to contradict the testimony of the State. The respondent may have been all that was claimed for him in the offer and yet have drunk intoxicating liquor on the occasion of the shooting and on the occasion to which the State's evidence referred.

Exception 13 was to the exclusion of the same class of testimony and the disposition of exception 12 disposes of this exception. We think there was no error in the exclusion of the offered testimony.

Exception 14 was to the failure of the court to charge that if the house on Webster Avenue was the home of the respondent, and that the witness, Cerutti, had been asked to go, and he still remained there after he had been ordered to go, that he was a trespasser, and being a trespasser the respondent had a right to eject him from his home if necessary by using force as was reasonably necessary for that purpose. There was no error in the Court's failure to instruct the jury as requested, because the record shows no evidence which would warrant the instruction so requested. *Rogers v. Bigelow*, 90 Vt. 41, 96 Atl. 417; *Citizens Savings Bank v. Fire Insurance Company*, 86 Vt. 267, 84 Atl. 970.

Only one question is raised in exceptions 15 and 16; viz. That the indictment charged the respondent with intent to kill and murder being armed with a dangerous weapon and the jury brought in a verdict of an assault with intent to kill, without including in that verdict the phrase "being armed with a dangerous weapon." The respondent assumes in this exception that an assault with intent to kill is a different offence from an assault being armed with a dangerous weapon with intent to kill or murder. The assumption is not sound. The *corpus delicti* is the assault, and "being armed with a dangerous weapon is regarded as aggravating the crime." *State v. Reed*, 40 Vt. 603. In other words, it is an aggravated assault and is an assault of the higher degree than an assault with intent to kill or a simple assault. Under the indictment in this case, a verdict could have been rendered for any of the degrees of assault from the highest to the lowest, if there had been evidence to warrant the verdict. An indictment charging the highest degree includes the lower degrees; *State v. Coy*, 2 Aikens 181; *State v. Thornton*, 56 Vt. 35, and *State v. Ambler*, 56 Vt. 672. In *State v. Smith*, 43 Vt. 324, an indictment for an assault with intent to commit rape, the proof was of an actual commission of rape. A conviction for an assault with intent to commit rape was held not to be error and to be a bar to a prosecution for the higher degree. In *State v. Locklin*, 59 Vt. 654, 10 Atl. 464, the respondent was indicted and tried for an assault upon Herman Hill, being armed with a dangerous weapon with intent to kill and murder, and was convicted on that indictment of a simple assault. Later he was indicted for a breach of peace by tumultuous and offensive carriage, by assaulting and striking Martin Hill, on the occasion when he committed the assault for which he was convicted. Held, that the conviction was a bar to the second prosecution. In the trial of the case before us the degree of the assault, as well as the assault itself, was a fact for the jury to find and finding the respondent guilty of an assault below the highest degree and the sentence being within the degree found, the respondent has no ground of complaint. Where one offence is a necessary element in and constitutes a part of another and both are in fact but one transaction, an acquittal or conviction of one is a bar to a prosecution for the other; *State v. Locklin*, *supra*, and *State v. Smith*, *supra*.

Judgment that there is no error in the proceedings of the county court and that the respondent take nothing by his exceptions. Let execution be done.

FRED FOWLER v. ROBERT ROGERS.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

Pleading—Misjoinder of Causes of Action.

There is no misjoinder in amending a declaration consisting of a count in case by adding thereto a count in trover.

TORT. Plea the general issue. Trial by jury in the Hartford Municipal Court, A. G. Whitham, Judge. Verdict for plaintiff.

The declaration consisted of a count in case for deceit. After the jury had been empaneled, plaintiff moved for leave to amend the declaration by filing an additional count in trover. Motion granted and defendant excepted.

After verdict and before judgment, defendant moved in arrest, alleging that the plaintiff had joined in the declaration two separate and distinct causes of action, inconsistent with each other. Motion overruled, and defendant excepted.

Charles Batchelder for defendant.

John J. Wilson for plaintiff.

MILES, J. This case comes to this Court on exceptions of the defendant to the rulings and judgment of the Hartford Municipal Court, on the defendant's motion in arrest of judgment.

We think and so hold that there is no merit in defendant's exception. Case and trover could always be joined at common law and their joinder does not depend upon any statute. In

Ayer v. Bartlett, 9 Pick. 156, 74 Am. Dec. 472, a declaration containing a count in trover was allowed to be amended by adding a count in case. It is stated in 23 Cyc., 391, "Trover and case may be joined, trover being originally an action on the case. So when an action is originally trover, new counts in case may be added by way of amendment." In *Moulton v. Witherell*, 52 Me. 237, it is held that a declaration containing a count in case may be amended by adding a count in trover. There was no misjoinder in this case and the court in its discretion committed no error in allowing an amendment.

Judgment affirmed.

RAYMOND AIKEN v. OLIVER METCALF.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

*Negligence—Last Clear Chance Doctrine—When not Applicable
—Automobiles—Intersection of Highways.*

The last clear chance rule does not apply where the plaintiff's negligence is concurrent and of the same degree as that of the defendant; and a requested instruction, in an action in tort for negligence, which permits the jury to find a verdict for plaintiff, although his negligence may have proximately contributed to his injury, was properly refused.

The intersection of a path across a village common with a highway is not an intersection of highways within the meaning of P. S. 4094, as amended by No. 147, Acts of 1912, requiring a warning signal to be given by one in control of an automobile, on approaching it.

Willey v. B. & M. R. R., 72 Vt. 120, overruled.

CASE FOR NEGLIGENCE. Plea, the general issue. Trial by jury at the September Term, 1916, Orleans County, *Stanton*, J.,

presiding. Verdict and judgment for defendant. Plaintiff excepted. The opinion states the case.

Cook & Norton for plaintiff.

J. W. Redmond for defendant.

MILES, J. This is an action to recover damages for an alleged injury to the plaintiff, occasioned by the defendant's negligence in operating an automobile. The injury occurred on a street in the village of Irasburg, running northerly and southerly along the easterly side of the common in that village. At the time of the injury, the plaintiff was crossing the street diagonally on foot in a northwesterly direction, intending to cross the common in a beaten path used for that purpose and when struck by defendant's car was west of the center of the street, which was from twenty-five to thirty-five feet wide. Just before the accident, the plaintiff came out of a store on the east side of the street, looked north and south, saw no team, auto or person in the street, traveled northerly on the sidewalk or platform of the store about fifty or sixty feet and then started to cross the street as stated above and in doing so looked neither to the north nor south for approaching teams or autos, except only so far as he could see without turning his head. Just before the accident, the defendant was on the westerly side of the common and in coming onto the street on the easterly side of the common he first went south to the southwesterly corner of the common, then turning easterly came to the southeasterly corner of the common, where he turned northerly onto the street in which the accident occurred, about two hundred feet south of where the plaintiff attempted to cross it. As he came onto that street, there was nothing to prevent his seeing the plaintiff while attempting to cross the street, if he had looked. He admitted that he did not blow the horn or give any signal, in making the sharp turns at the southwest and southeast corners of the common and did not see the plaintiff until just before the collision and not in season to avoid it. The plaintiff's testimony tended to show that he did not see the automobile until about the time he was struck by it and not in time to avoid it.

The case was tried by jury and verdict and judgment were rendered for the defendant. Only two exceptions

were reserved by the plaintiff, the first of which was a request to charge as follows: "If you find the plaintiff was negligent in attempting to cross the street at the time he did, and you find the defendant, had he been looking, would have discovered the plaintiff when he had reached a place of danger and had been able to avoid him, then the plaintiff would be entitled to recover," which the court refused. The plaintiff based this exception upon the last clear chance rule and upon no other ground. There is more or less confusion, if not conflict, in the treatment of this subject by the courts in different jurisdictions; but this Court is committed to the doctrine that the last clear chance rule cannot be invoked where the negligence of the plaintiff is concurrent with that of the defendant. The law on that subject, as recognized in this State, is well stated in *French v. Grand Trunk Ry. Co.*, 76 Vt. 441, 58 Atl. 722, that when a traveller has reached a point where he cannot extricate himself and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition and not the proximate cause of the injury and will not preclude a recovery, but that it is equally true that if a traveller, when he reaches the point of collision, is in a situation to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. The rule that if the plaintiff's negligence proximately contributes to his own injury he cannot recover, is so well settled in this State that it needs no citation of authorities upon that point, and therefore the last clear chance rule can never apply where the plaintiff's negligence is concurrent with and of the same degree as that of the defendant. A charge as requested by the plaintiff would justify the jury in finding for him, though his negligence may have proximately contributed to his own injury. That the plaintiff cannot recover when his negligence is concurrent with and of the same degree as that of the defendant, is also shown in *Trow v. Vt. Central R. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191, in which the authorities upon that subject are collected and commented upon. The only case in this State in conflict with the rule laid down in *French v. Grand Trunk Ry. Co.*, *supra*, is *Willey v. B. & M. R. R.*, 72 Vt. 120, 47 Atl. 398. In that case, *Trow v. The Central Vt. R. R. Co.*, *supra*, is cited in support of the conclusions reached in the Willey case;

but, as we have seen, the Trow case does not support the Willey case.

In the Willey case the holding would permit a recovery when the negligence of the plaintiff was concurrent with that of the defendant. That case makes the negligence of the defendant the controlling factor in the consideration of his liability, regardless of the plaintiff's negligence. In the French case the Court comments upon the Willey case and impliedly, at least, overrules it. The Willey case has never been relied upon by this Court since it was promulgated, as an authority for the law stated in the opinion. *French v. Grand Trunk R. R. Co.*, *supra*; *Flint's Admr. v. Central Vt. Ry. Co.*, 82 Vt. 269, 73 Atl. 590. The Willey case does not state the law as this Court understands it, and, as it is sometimes referred to in briefs of attorneys, we take this occasion to expressly overrule it. There was no error in the court's refusal to charge as requested.

The other exception of the plaintiff was as follows: "The plaintiff excepts as to the charge of the court which eliminates the sounding of the horn as being a matter of negligence, because the plaintiff claims that the pathway across a highway and common was an intersection of the highway under the statute." The plaintiff argues that this last exception is to the court's failure to charge respecting the defendant's neglect to sound the horn or give any other signal before making the turn at the southeast corner of the common. The defendant argues that that question is not raised by the exception taken, and that the only exception saved by the plaintiff with respect to giving a signal is to the court's failure to charge that the path across the highway and common was an intersection of highways and that it was the duty of the defendant to sound the horn on approaching that crossing. We think the exception taken was not to the court's failure to charge that it was the duty of the defendant to sound the horn on approaching the southeast corner of the common, but was to the court's failure to charge that it was the defendant's duty to sound the horn on approaching the pathway crossing. The reason stated as the ground of the exception shows that the exception related to the crossing and nothing else, and the court was justified in so understanding it.

There was no error in the court's omission to charge that the path across the highway and common was an intersection of highways within the meaning of the statute and that it was the

duty of the defendant to give a signal on approaching it; for it was not an intersection of highways, requiring the defendant to give a signal on approaching it.

Judgment affirmed.

R. N. BALDWIN v. J. H. GAINES.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

Witnesses—Examination—Reading Authorities—Harmless Error—Evidence—Experts—Cross Examination—Negligence—Question for Jury—Charge—Damages—When not Supported by Evidence.

In an action against a physician for malpractice, it was improper to ask defendant, in direct examination, whether a certain book on medical science exactly described the treatment in question; because the contents of the book not being evidence of the facts therein stated, the passage could not be thus indirectly introduced in evidence.

Where an expert witness testifies to his own experience and observation only, authorities cannot be read into the case, either directly or indirectly, in his cross examination; but where he testifies as to what the authorities show, or bases an opinion in whole or in part upon what they advocate, the books may be used to contradict the witness and to discredit his testimony, though he mentions no particular author.

In an action against a physician for malpractice, the admission in evidence of a statement contained in a book upon medical science was, under the circumstances, harmless error.

In an action against a physician for malpractice, the answer of plaintiff's medical expert that a careful examination should be made, when asked what should be done where severe pain continued at

the point of fracture, after plaintiff's broken leg had been set by defendant, was not prejudicial.

Error, if any, in the exclusion of a question asked an expert witness on cross examination as to a statement in a book upon medical science, was rendered harmless by reading the passage later in the trial to another witness, without objection, all the benefit thereof having been thus obtained.

Under the circumstances, *held*, it could not be said from the record that the exclusion of proposed questions as to the time when the witness first noticed a deformity of the plaintiff amounted to an unwarranted limitation of the right of cross examination.

In an action against a physician for malpractice, it is proper to allow an expert witness to testify that the deformity of plaintiff's leg was such as would be produced by bandaging the leg to a side splint as done by defendant; and the witness is not disqualified by the fact that he had never had experience with this method of treatment.

In an action against a physician for malpractice, defendant was not harmed by the admission of a question and answer on cross-examination of an expert, under objection on the ground that the question assumed a fact not appearing in evidence, when it appeared that there was evidence, though vague, of such fact, and where the answer was not based upon it.

There is no error in permitting on the cross examination of an expert, a question based upon the same hypothesis as that made by opposing counsel in asking a question of the same witness on direct examination.

In an action against a physician for malpractice, evidence offered by defendant that two physicians who assisted the witness in cases where he gave the same treatment as that given by defendant to plaintiff approved thereof, is not admissible.

That expert witnesses, entertained at some previous time similar views to those expressed by them in testifying is immaterial.

Evidence examined and *held* that the negligence of defendant, and the damages resulting therefrom, were jury questions.

That defendant's evidence tended very strongly to disprove his negligence did not warrant the granting his motion for a verdict, there being evidence fairly and reasonably tending to support the plaintiff's claim.

Charge examined and *held*, to be warranted by the evidence and declaration.

In an action against a physician for malpractice, plaintiff's loss of earning capacity is a proper element of damage, and ordinarily, with an adult, this is to be shown by proof of what he earned before the injury and what he has been earning since, but enough facts must be shown to enable the jury to make an intelligent determination of the extent of his loss.

In an action against a physician for malpractice, evidence that after the injury the plaintiff, who was a traveling salesman, was lame, suffered pain, and was unable to carry his samples and get around as before, and that for this reason his employer cut down his territory, and that his salary was just what it was before, is, standing alone, an inadequate and insufficient basis for submitting to the jury, as an element of damage, his loss of earning capacity.

CASE against a physician for malpractice in setting and caring for a fractured femur. Plea, the general issue. Trial by jury at the September Term, 1916, Orleans County, *Stanton, J.*, presiding. Verdict and judgment for plaintiff. Defendant excepted.

J. W. Redmond and Aaron H. Grout for defendant.

Frank D. Thompson, J. Rolf Searles and E. S. Jones for plaintiff.

POWERS, J. This is an action against a physician for malpractice. There was evidence tending to show that the plaintiff was in an automobile accident and suffered a simple, oblique fracture of the middle third of the right femur. He was taken to a hotel in Newport, where he was attended by the defendant and another physician, Dr. Blanchard. These two doctors, with other assistance, set the leg, making use of a long splint, called a Liston splint. Both doctors attended the plaintiff for a time, and the defendant attended him until he was moved to his home in Irasburgh, on December 20, 1913, which was about three weeks after the accident. Two days after this removal, the defendant visited the plaintiff professionally at the latter's home, and once later saw him when he was at Irasburgh to visit another patient. On January 15, 1914, Dr. Templeton, who was then caring for the plaintiff, removed the splint and found the injured leg two and one-fourth inches shorter than the other one. This condition is permanent, and the ends of the broken bone overlap, so that

there is an angular deformity at the point of fracture. This result causes pain and discomfort, and interferes with his ability to handle his business.

The plaintiff called the defendant to the stand and examined him as a witness. When he was questioned by his own counsel, he was asked what medical authorities prescribed the method of reduction and treatment used by him on the plaintiff; and, without objection he replied that Walsham was such an authority. Thereupon his counsel produced a book entitled "Surgery, its Theory and Practice," by the author named, and asked the witness if the book, on pages 445 and 446, exactly described the method so used by him. This question was excluded and the defendant excepted. The exclusion was correct. That the contents of the book were not evidence of the facts therein stated is shown by *Rogers v. State*, 77 Vt. 454, 61 Atl. 489, and many other cases outside the State. And it is improper, in the circumstances here existing, to ask a medical expert if he is acquainted with a certain book, and calling his attention to a particular paragraph, to ask a question in the language of the book, and thus indirectly introduce such passage in evidence. *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55; *In re Mason*, 60 Hun 46, 14 N. Y. Supp. 434; *State v. Coleman*, 20 S. C. 441; *People v. Goldensen*, 76 Cal. 328, 19 Pac. 161; *St. Louis, etc. R. Co. v. Jones*, (Tex.) 14 S. W. 309; *Lilley v. Parkinson*, 91 Cal. 655, 27 Pac. 1091. See *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438. The suggestion that the evidence would corroborate the witness is without force. It is not permissible to reinforce a witness in this way. *Gallagher v. Market St. R. Co.*, 67 Cal. 13, 6 Pac. 869, 56 Am. Rep. 713; *Fox v. Penninsular, etc. Works*, 84 Mich. 676, 48 N. W. 203; *Davis v. State*, 38 Md. 15.

There was no error in the cross examination of Dr. Stockwell. He was an expert witness for the defendant, and in his direct testimony, referring to the method used by the defendant, asserted that it was a treatment recognized by the best authorities. In cross examination he was very properly asked to name the authorities thus referred to (*Chicago Union Trac. Co. v. Ertrachter*, 228 Ill. 114, 81 N. E. 816) and replied that Walsham was the one he most relied upon, and that Stimson spoke of this method. Thereupon, the witness was asked if Stimson did not say that traction by weight and pulley or elastic traction was almost exclusively employed in such cases; and, subject to excep-

tion, the witness replied in effect, that he did. It is apparent that in his first statement, the witness intended to have the jury understand that Stimson approved the Liston method of treatment. It was, therefore, proper cross examination, to show by the book itself that the author did not approve such treatment. While it was not permissible to read the book into the case for the mere purpose of showing that the author disagreed with the witness (*Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679; *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150; *State v. Brunett*, 28 N. D. 539, 150 N. W. 271, Ann. Cas. 1916 E, 340), it was permissible to contradict and discredit him by showing that the book did not warrant his statement. *Gallagher v. Market St. R. R. Co.*, 67 Cal. 13, 6 Pac. 869, 51 Am. Rep. 680; *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679; *People v. Millard*, 53 Mich. 63, 18 N. W. 562; *Ripton v. Bittel*, 30 Wis. 614; *Clark v. Com.*, 111 Ky. 443, 63 S. W. 740.

Dr. Young, another expert for the defendant, testified in direct examination that the Liston method was well recognized by the authorities. He also testified in cross examination that he had observed that there was usually a great deal of pain from the use of Buck's extension. Thereupon, counsel for the plaintiff asked the witness if Scudder on Fractures, a recognized authority, did not say that as a general rule the use of Buck's extension was followed by very little pain; and he was shown the book to refresh his recollection. This was objected to by the defendant, but the objection was overruled and the answer taken subject to exception. This was error. It was not competent to contradict the witness in this way. As to the matter of the pain incident to the use of Buck's extension, this witness spoke of his experience and observation only, and made no reference, directly or indirectly to Scudder or any other medical authority. His standing was entirely different from that of Dr. Stockwell, who spoke wholly of what the authorities approved. And right there lies the vital distinction. When an expert witness testifies to his own experience and observation only, authorities cannot be read into the case, either directly or indirectly in his cross examination. *Enos v. St. Paul F. & M. Ins. Co.*, 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796; *State v. Brunette*, 28 N. D. 539, 154 N. W. 271, Ann. Cas. 1916 E, 340. But when he testifies as to what the authorities show, or bases an opinion in whole or in part upon what they advocate, the books

may be used to contradict the witness and to discredit his testimony, though he mentions no particular author. *State v. Brunette*, 28 N. D. 539, 150 N. W. 271, Ann. Cas. 1916 E, 340; *Wittenburgh v. Onsgard*, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141.

Just when and how far these books can be used to test the qualifications of the witness, we do not now inquire as the transcript shows that this ground of admissibility, if otherwise available, was excluded by what was said and done below. But this error is not made to appear harmful. When the answer of the witness was complete, it appeared that all the author said was that "ordinarily there would be little or no pain associated with the repair of the fracture", without a word about any particular method or apparatus. The defendant had already admitted that Scudder made this statement, and under any rule and in any view the error was harmless.

Dr. Templeton, testifying for the plaintiff as an expert, said that when a leg was put up as this one was, and severe pain continued at the point of fracture, it indicated that the dressings were too tight at some place, or the parts were not in apposition. So far no objection was made. He was then asked what should be done in a case like that, and subject to exception replied that a careful examination of the injured parts should be made. We need take no time with this exception. It is so obvious from the testimony that such an examination should be made in the circumstances stated that the answer could not have prejudiced the defendant.

During the cross examination of Dr. Templeton, he testified that the books approved of various methods of securing the requisite extension, counter extension and fixation in such fractures as here involved; but that he had never observed an approval of the use of a splint of the character of the one employed by the defendant, though he had read of it in obsolete works. He was then shown a copy of *Stimson on Fractures*, published in 1900, and he testified that he never heard of it before and knew nothing about it as an authority, but should not call it obsolete. He was then asked if he noticed that among the dressings therein prescribed was a side or hip splint, usually with traction. This question being objected to was excluded, and the defendant excepted.

The object of this inquiry, as stated by counsel and as shown by a formal offer, was to show the fact that the author approved this kind of a splint. But later on in the trial, the passage referred to was read to Dr. Longe, and all the benefit therefrom asked for by counsel was obtained. Thus the error, if any, was rendered harmless. *Livingston Mfg. Co. v. Rizzi Bros.*, 86 Vt. 419, 85 Atl. 912.

A sister of the plaintiff, who took care of him a part of the time during his disability, testified that she observed that the injured leg was shorter than the other. In cross examination she was asked to state how long it was after she began taking care of him that she made this discovery, and replied that she did not remember. She was asked if it was within a week, and replied that perhaps it was not. She was then asked if it was within two weeks, and replied that she wouldn't say, and if within three weeks, and replied that she did not know how long a time it was. Counsel then proposed to ask her if it was four weeks, five weeks, six weeks, and these several questions were excluded and the defendant excepted. It appeared that the witness made this discovery while the plaintiff was being cared for at Newport, and that Miss Hackett, a nurse, had charge of the patient for a week after the witness arrived. It also appeared that the plaintiff was taken to Irasburgh in three weeks after the accident, or to be accurate, three weeks and one day. The effect of the witness' testimony was that she did not discover the shortage of the limb until after Miss Hackett went away. So there were only two weeks of the stay in Newport left, and it was well within the discretion of the court to confine the questions to that period of time. This period counsel was allowed to cover. And while the witness might well have been required to be more definite as to the time, and the matter was of considerable importance, we cannot say from the record that the exclusion of the proposed questions amounted to unwarranted limitation of the right of cross examination.

Dr. Aldrich, an expert witness for the plaintiff, testified that he had never used or seen used a Liston splint and knew nothing regarding results of that method of treatment. He was shown two X-ray plates, which were exhibits in the case, and asked whether, assuming the plates were taken of the plaintiff's injured leg, the angular deformity shown was such as would be produced by bandaging the leg to this side splint as done by the

defendant; and subject to exception, he was allowed to answer that it was. The defendant now argues that this was error because it was allowing the witness to usurp the province of the jury by expressing an opinion on the very question the jury was to decide; and the familiar rule forbidding this is quoted. But it will not do to accept this rule too literally. 11 R. C. L. 583, 584. It is not at all unusual to allow an expert witness to give an opinion that a particular condition is due to a specified cause; certainly the rule is liberal enough to allow him to say that it might be. 3 Chamb. Ev. § 2420. *State v. Noakes*, 70 Vt. 247, 40 Atl. 249; *State v. Marino*, 91 Vt. 237, 99 Atl. 882. Some of the authorities make a distinction between the two statements above, admitting the latter, but not the former. *Castanie v. United Rys. Co.*, 249 Mo. 192, 155 S. W. 38, L. R. A. 1915 A, 1056. But many cases sustain the admission of both. Note L. R. A. 1915 A, 1058; 11 R. C. L. 584, and cases, note 19; *Supreme Tent, etc. v. Stensland*, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137; *Tullis v. Rankin*, 6 N. D. 44, 68 N. W. 187, 35 L. R. A. 499, 66 L. R. A. 586.

The fact that Dr. Aldrich had never had experience with this method of treatment did not disqualify him. *Niles v. C. V. Ry. Co.*, 87 Vt. 356, 89 Atl. 629.

Dr. Stockwell testified to the tendency of the ends of the broken bone to slip by each other in case the splint was removed before boney union had sufficiently progressed. In cross-examination he was asked if he would expect any sliding by if, at the time the splints were removed, a plaster cast was immediately put on, and bandages were put around it; and, subject to exception, replied that he would not, that the cast, if properly applied would tend to prevent it. The objection to this was put upon the ground that there was no evidence in the case to show that there was a bandage outside of the plaster cast. But a Mrs. Hilliker testified—rather vaguely, it must be admitted—in a way to indicate that there was something in the nature of a bandage outside the cast. At any rate, the answer of the witness shows beyond question that his reply was not based upon the presence of a bandage, but wholly upon the plaster cast. So the defendant was not harmed.

Dr. Schofield was an expert witness for the defendant. In his direct examination he was asked about the effect upon the muscles of the injured leg the fact that the automobile rested

upon it for half an hour before he was released would have, and replied that he should expect it to paralyze the muscles and lessen the amount of contraction. He was then asked, "Suppose a person, so far as the case shows, wasn't used to using intoxicating liquor, should, in addition to having the automobile rest on his leg, have taken some liquor, would that tend to relax the muscles?" And he replied that it would, if he had enough. In cross-examination the witness was asked, "Now, assuming that the fellow wasn't accustomed to taking intoxicating liquor, had about six o'clock in the afternoon one drink, * * * would you expect that that drink * * * would affect the muscles of the broken limb?" The witness answered, subject to exception, that he should say it would not. The only objection made to this question was that the witness was asked to assume that the man referred to—the plaintiff—had not been accustomed to use liquor. But this was the hypothesis made by the defendant as the basis of his question quoted above. To be sure, counsel for the defendant added to his question the clause "so far as the case shows," but this did not make the questions essentially different. The question admitted was warranted by the direct examination and the exception is not sustained.

Dr. Kendrick was another of the defendant's experts. He testified that he had used a Liston splint in three cases, that Dr. Stockwell assisted in one of the cases, and Dr. Cushman in another. The court declined to allow the witness to say whether they approved the method adopted by him, and the defendant excepted. The ruling was without error. Their approval could only have been indicated by what they said, or possibly by what they did, on the occasions referred to. The offer, at best, was a mere attempt to show what those doctors then thought about the propriety of that method. This would be nothing but hearsay. Both these doctors were in court and were witnesses in the defendant's behalf. As such, they approved the defendant's method of treatment, and gave him the benefit of their present opinion regarding it. That they entertained similar views at some previous time was immaterial. See *McGovern v. Hays & Smith*, 75 Vt. 104, 53 Atl. 326.

At the close of the evidence, the defendant moved for a verdict on the following grounds: (1) That there was no evidence tending to show negligence on the part of the defendant; (2) If such evidence is to be found, there is nothing tending to show that the damages complained of resulted from that negligence.

A disposition of this motion does not require an extended review of the evidence. The defendant himself testified that it was an easy case and that there was no reason why there should have been such a shortening of the injured leg. All agreed that the thing to be done was to reduce the fracture and keep the ends of the broken bone in place. To accomplish this three things were essential; apposition, extension and counter extension, and fixation. Any approved method of treatment that secured these was a good method, and good practice required nothing more. But there was evidence fairly and reasonably tending to show that this defendant failed on the very first requirement—that he failed to set the bone. We need only refer to the testimony of Dr. Blanchard, Dr. Ross, and Miss Baldwin to justify this statement. And then there was testimony justifying the inference that if the bone was properly set, the defendant failed to keep it in place. The pain, deformity and shortening of the leg indicated this. And according to the plaintiff's evidence, especially his medical evidence, his present condition is due to these failures of the defendant, one or both. That the defendant's evidence tended very strongly to the contrary did not warrant granting the motion. The case was for the jury and the motion was properly overruled.

The defendant excepted to the charge of the court wherein it allowed the jury to find defendant negligent for using the Liston method rather than some other, insisting that on the evidence it was not permissible to find that this method did not accord with the degree of knowledge, care and skill had and exercised by physicians engaged in the same general line of practice in that general neighborhood. This exception cannot be sustained. It assumes that the evidence was all one way on this phase of the case. It ignores the medical testimony tending to show that this method is obsolete; that it was not used by certain other physicians in that locality; that it would not insure complete fixation; and that it was inefficient in the matter of extension, unless the perineal band connected with it was constantly watched.

The defendant excepted to the charge wherein it allowed the jury to award damages on account of the deformity at the point of fracture, claiming that the plaintiff had not covered this by his declaration. But the second count sufficiently declares for it, and the exception is not sustained.

The defendant excepted to the charge because it did not make clear to the jury that the defendant would not be liable if, in selecting a method of treatment, he chose one just as good as those generally recognized by the profession in that locality, even if it was not in general use there. The only suggestion made in the brief in support of this exception is that "the defendant was entitled to an instruction making it clear beyond question that he was not bound to choose and use any one particular method of treatment or reduction, but that he might employ any one of the several methods approved by the authorities and used by physicians in his general neighborhood and in his general line of practice and that he could not be held guilty of negligence solely for so choosing." The court charged that the defendant could not be held liable for a mere error of judgment in choosing from several well recognized and authoritative methods of treatment, the one he in fact used; and that he could not be held liable if the method chosen was a proper method and one well recognized in the same general neighborhood by those in the same general line of practice. So far as the criticism here made is concerned the charge was all that the defendant was entitled to.

Another exception to the charge is predicated upon the assumption that the court asked the jury to consider the question whether this leg was so put up that there could be no movement of the bones and no shortening of the leg. An examination of the page of the transcript to which we are referred (p. 851) shows that the language used by the court was as follows: "Was it in such a shape that it would hold those bones in apposition? Was it in such a condition that there would be no unnecessary shortening of the limb? Was the leg treated by the method it was treated in such a way that there could be no movement to the side?" This language does not make the defendant an insurer of a perfect result. It recognizes that there may be some shortening of the limb without liability of the physician. It requires a doctor to set the leg and hold the bones in apposition and to guard against crowding the bones sideways. This exception is not sustained.

The defendant excepted to that part of the charge wherein the court said that the plaintiff's evidence tended to show that the setting of the leg was unskilful. In support of this exception it is urged that there was no evidence having that tendency.

But as we have seen, the defendant testified that it was a very easy case to manage and some of the doctors testified in a way tending to show that the leg was never set. This statement of the court, then, was fully warranted.

There was no error in submitting to the jury the question of negligence on the defendant's part after the plaintiff was moved to Irasburgh. The exception went upon the ground that there was no evidence tending to show such negligence. Here, again, the defendant overlooks the plaintiff's medical evidence. It was to the effect that the use of a Liston splint required the attendant to keep close watch lest the bandages become loose and allow the bones to get out of place; and that it was unsafe to leave the patient after the third week in the care of an untrained person; there was evidence that the defendant's engagement continued after the plaintiff went to Irasburgh; that he was notified that his patient was suffering much pain at the point of fracture; that this was an indication that something was wrong; and that he did not go to Irasburgh to look after the plaintiff. All this made a question for the jury, and the exception is without merit.

The defendant excepted to the charge because the court told the jury that unless there was a settlement and discharge the defendant was bound, as matter of law, to continue his attentions to the plaintiff after he went to Irasburgh. This was not the effect of the instruction. The court explained to the jury how the relation of physician and patient could be terminated, and left it to them to say whether in fact such relation had here terminated before the plaintiff went to Irasburgh, or just after. The defendant did not question the rules of law laid down, but asked only that the question be submitted to the jury. This is just what was done.

The court charged the jury that if they reached the question of damages they should include in their assessment an allowance for the plaintiff's pain and suffering, his loss of time, and his disability, so far as the defendant's negligence and want of skill was responsible therefor; and if they found that such negligence and want of skill resulted in the plaintiff's being in such a condition that he could not earn what he otherwise would, they could take that into consideration in the assessment. To this last instruction the defendant excepted on the ground that the evidence was that he was earning at the time of the trial just what he earned before the accident, and that there was no evi-

dence tending to show that he would be earning more if he hadn't suffered this injury, and that it was error to allow the jury to speculate on that subject.

This exception will have to be sustained. Of course, the earning capacity is a proper element of damage in such cases. *Lincoln v. C. V. Ry. Co.*, 82 Vt. 187, 72 Atl. 821, 137 Am. St. Rep. 998. But this element, like any other, must be proved. *Watson Dam.*, § 502; and enough facts must be shown to enable the jury to make an intelligent determination of the extent of this loss. Ordinarily, with an adult, this is to be shown by proof of what the party earned before the injury and what he has been earning since. *Louisville, etc. R. R. Co. v. Pearson*, 97 Atl. 211, 12 So. 176; *Chicago, etc. R. R. Co. v. Spence*, 213 Ill. 220, 72 N. E. 796, 104 Am. St. Rep. 213; 8 R. C. L. 478. The transcript shows that the plaintiff is a traveling salesman; that he has to walk a great deal and carry his samples; that since his injury he has been lame and suffers much pain; that he has been unable to carry his samples and get around as before; that for this reason, his employer has cut down his territory; that his salary is just what it was before the accident.

Assuming that this was evidence tending to show a diminution of earning capacity within the meaning of the law, it was, standing alone, an inadequate and insufficient basis for submitting this element of damage to the jury. It does not afford the means of an intelligent estimate of the amount the assessment ought to include on this account. *Alabama F. & I. Co. v. Ward*, 194 Ala. 242, 69 So. 621; *Diamond Rubber Co. v. Harryman*, 41 Col. 415, 192 Pac. 922, 15 L. R. A. (N. S.) 775; *Birmingham Ry. L. & P. Co. v. Harden*, 156 Ala. 244, 47 So. 327. See *Marshall v. Dalton Paper Mills*, 82 Vt. 489, 74 Atl. 108, 24 L. R. A. (N. S.) 128; *Beaulac v. Robie et al.*, 92 Vt. 27, 102 Atl. 88. The harmful character of this error is the more apparent when it is noted that the jurors were instructed without restriction that the plaintiff was entitled to recover "all the damage that you are reasonably satisfied he will sustain in the future." Thus he was not only allowed, without sufficient evidence, to recover for what he had already lost in earning capacity, but the jury was permitted to speculate as to how his capacity to earn money would be affected in the future.

Judgment reversed as to damages, and cause remanded for retrial on that question only.

WINFIELD S. HOLT v. ADOLPHUS RULEAU.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed January 4, 1918.

Common Counts—Recovery Thereunder—Money which Defendant cannot Conscientiously Retain—Laches—When Available as Defence.

Where one has money in his hands belonging to another, which he has no right conscientiously to retain, the same may be recovered in an action of contract on the common counts.

Defendant conveyed by warranty deed certain land to plaintiff's father, on whose death it was decreed by the probate court to the plaintiff. Defendant, thereafter, deeded the same land by warranty deed to plaintiff, who did not know that it had been decreed to him, but believed it to be owned by defendant, as the latter knew. *Held*, defendant could not conscientiously retain the purchase price paid him by plaintiff, and the fact that plaintiff had not offered to release him from liability on his warranty deed, did not affect his liability, he being already bound by his warranty deed to plaintiff's father, to whose rights plaintiff succeeded.

To avail himself of the equitable defence of laches, a defendant must make it appear that the delay of which he complains has worked an injury to him.

CONTRACT, in the common counts. Plea, the general issue. Heard on the report of a referee at the December Term, 1916, Bennington County, *Slack*, J., presiding. Judgment for plaintiff. Defendant excepted. The opinion states the facts.

Batchelder & Bates for defendant.

Holden & Healey for plaintiff.

Where money has been obtained by one person from another through fraud or mistake and without consideration, it may be recovered back in this form of action. *Johnson v. Cate*, 77 Vt.

218, 225; *Colgrove v. Fillmore*, 1 Aik. 347; *James v. Hodsdon*, 47 Vt. 127; *Loomis v. Wainwright*, 21 Vt. 520; *C. & P. R. R. Co. v. Newell*, 31 Vt. 364; *D'Utricht v. Melchor*, 1 Dall. 428, 1 L. ed. 208; *Sharkey v. Mansfield*, 90 N. Y. 227; 2 Greenleaf on Evidence, Secs. 123, 124.

MILES, J. This is an action of contract on the common counts, to recover money paid under a mistake of fact. The case was referred and report made, and upon the finding of facts reported, judgment was rendered for the plaintiff. No exception was taken to the report and only one is brought to this Court, and that is to the judgment rendered upon the report.

From the report and the exhibits referred to and made a part thereof, it appears that on the 13th day of December, 1864, Edwin D. Mattison conveyed a ten acre piece of land in Sunderland, Vt., to the defendant; that on the 31st day of March, 1869, the defendant conveyed the same land to Timothy H. Holt, father of the plaintiff, by warranty deed which was duly recorded in the land records of said Sunderland on the same day; that afterwards the said Timothy died, and on the 20th day of March, 1902, the probate court for the district of Manchester decreed the same land, with other real estate, to the plaintiff, described in said decree as follows: "The home farm in said Sunderland, being all the real estate standing in the name of the said Timothy Holt, deceased." Said decree was recorded in the land records of Sunderland on the first day of April, 1902. On the 9th day of September, 1904, the deed from Mattison to the defendant not having been recorded, and the plaintiff, not knowing that he was the owner of the ten acre piece of land previously deeded to the plaintiff's father by the defendant, and decreed to him by the probate court, bargained for the same land, and received from the defendant a warranty deed of the same for which he then and there paid the defendant the sum of one hundred dollars. On the 23rd day of September, 1904, the defendant for the first time caused the deed given to him by Mattison in 1864, to be recorded.

This suit is brought to recover the one hundred dollars paid by the plaintiff to the defendant as herein stated, and the only question raised is whether the facts reported justify the judgment rendered.

It is well settled in this State that where one has money in his hands belonging to another, which he has no right conscientiously to retain, the same may be recovered in a suit in contract on the common counts. *Rowell, J.*, states the correct principle in *State v. St. Johnsbury*, 59 Vt. 332, 10 Atl. 531, in the following language: "But in order to maintain this action there need be no privity between the parties, nor any promise to pay, other than what arises and is implied from the fact that the defendant has money in his hands belonging to the plaintiff that he has no right conscientiously to retain. In such case the equitable principle on which the action is founded implies the promise. Where the fact is found that the defendant has the plaintiff's money, if he can show neither legal nor equitable grounds for keeping it, the law creates the privity and the promise."

In the case at bar it is found that the defendant has in his hands money received from the plaintiff for which he gave the plaintiff nothing, the plaintiff at the time believing that he was receiving something for it, and the defendant knowing that he so understood. In the circumstances of this case, the defendant has money in his hands which he cannot "conscientiously retain."

In line with *State v. St. Johnsbury, supra*, are *Ketchum v. Catline*, 21 Vt. 191; *Babcock v. Granville*, 44 Vt. 325; *Varnum v. Highgate*, 65 Vt. 416, 26 Atl. 628; *James v. Hodsdon*, 47 Vt. 127; *Mathie v. Hancock*, 78 Vt. 414, 63 Atl. 143; *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865; *Underhill v. Rutland R. R. Co.*, 90 Vt. 462, 98 Atl. 1017.

The defendant argues that no demand before suit was brought is found and that for that reason the judgment is erroneous. No demand was necessary. *Babcock v. Granville, supra*; *Varnum v. Highgate, supra*; *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354, 45 Atl. 896.

The defendant further argues that the plaintiff is not entitled to recover on the facts found, because it does not appear in the findings that he did not know that he was the owner of the ten acre piece. The referee finds in express words that he did not know and supposed that the defendant was the owner of the land deeded to him.

The defendant further argues that the report does not show that the plaintiff offered to place the defendant in his former position by relieving him from his liability on his warranty in the

deed to the plaintiff. This argument is not well grounded, for the warranty in the deed to the plaintiff created no additional liability of the defendant, he being at the time that deed was given liable under the former warranty to the father of the plaintiff, to whose rights the plaintiff succeeded.

The defendant claims that the report shows that the plaintiff is guilty of laches and therefore he cannot recover upon the facts found. Laches, as all the authorities agree, is an equitable defence, and if a defendant would avail himself of that defence, he must make it appear that the delay has worked an injury to him. The principle is well stated in 10 R. C. L. 396, § 143, as follows: "Hence, it has been said, laches in a legal significance, is not merely delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right."

This does not appear in the report in this case and hence the defendant has no standing upon this ground. There was no error in the judgment below.

Judgment affirmed.

WILLIAM F. JONES v. SAMUEL HOAG AND IDA HOAG.

October Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, and TAYLOR, JJ.

Opinion filed October 8, 1917.

Interstate Ferries—Construction of Legislative Grant—Powers of State Legislature.

A legislative grant of the right to maintain and operate a ferry across Lake Champlain from Rouses Point, New York, to Alburg, Vermont, is not a grant of a ferry franchise from the Vermont shore.

A state may grant a franchise for a ferry from its own shore across a boundary river or lake, and such franchise is good and valid within the limits of the territory of the state granting it; but a state has no power to grant a ferry franchise from the shore of the state on the other side of such boundary river or lake to its own shore.

APPEAL IN CHANCERY. Heard on demurrer to the bill of complaint in vacation after the August Term, 1915, Grand Isle County, *Stanton*, Chancellor. Demurrer overruled, *pro forma*, and bill adjudged sufficient. Defendants appealed. The opinion states the case.

F. L. Webster and *E. A. Ayers* for plaintiff.

V. A. Bullard and *C. P. Cowles* for defendants.

WATSON, C. J. The bill is filed in this case to enjoin the defendants from disturbing the plaintiff in the enjoyment of the ferry rights claimed by him as set forth in the bill, for damages, and for general relief. The alleged ferry rights are based upon an enactment of the General Assembly of this State, approved March 30, 1915, and to take effect from its passage, whereby the plaintiff was granted (Acts of 1915, No. 258, Sec. 1), "The exclusive right and privilege of maintaining and operating a ferry

across Lake Champlain from Rouses Point in the State of New York, to Windmill Point in Alburg (in the State of Vermont), and to all points north from said Windmill Point to the Canadian line and south from said Windmill Point for a distance of three-fourths of a mile, as the convenience of the public may require, for the term of ten years, to be computed from the first day of April, 1915."

This act is made a part of the bill and is before us as such. No ferry rights are alleged or claimed by the plaintiff, other than under this grant, to have been violated. Want of equity was one of the alleged grounds of the demurrer to the bill. The demurrer was overruled *pro forma*, and the benefit of the demurrer was reserved to the defendants until the final hearing.

It is contended by the defendants (1) that the provisions of the act of 1915, do not constitute a grant of a ferry franchise from the Vermont shore; and (2) that the General Assembly of this State has not the power to grant such a franchise from the shore of the State of New York. With each of these contentions we quite agree. As to the first, the language of the act in the respect named is so plain and unambiguous that nothing is left open to construction. Clearly it is not the grant of a franchise from the Vermont shore. As to the second, the law is well settled that a state may grant a franchise for a ferry from its own shore across a boundary river or lake, and that such franchise is good and valid within the limits of the territory of the state granting it; but the law is equally well settled that a state has no power to grant a ferry franchise from the shore of the state on the other side of such boundary river or lake. In *Conway v. Taylor*, 1 Black, 603, 17 L. ed. 191, the appellees had a Kentucky franchise for a ferry from the Kentucky shore across the Ohio River from the city of Newport in that state, to the city of Cincinnati in the State of Ohio. The appellants commenced running a ferry boat from Cincinnati to Newport and from Newport to Cincinnati. A preliminary injunction was granted, restraining them from operating a ferry boat between the two cities. The circuit court held that the entire right to ferry to and from the Kentucky shore was in the appellees alone, and perpetually enjoined the appellants from conducting a ferry from or to the opposite side of the Ohio River. This judgment was reversed by the State Court of Appeals, the decree and injunction there being for the same party, but only so far as the

acts complained of were in violation of the appellees' ferry rights granted by Kentucky from the shore of that State. This was affirmed by the Supreme Court of the United States, the holding of that court being, among other things, "'A ferry is in respect of the landing place, and not of the water. The water may be to one, and the ferry to another.' 13 Vin. Abr., 208, A." And again, "The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others."

What the court there said in these respects is quoted with approval by Chief Justice White in *St. Clair County v. Interstate S. & C. T. Co.*, 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. 300, and by Mr. Justice Hughes in the recent case of *Port Richmond & B. P. F. Co. v. Board of Chosen Freeholders*, 234 U. S. 317, 58 L. ed. 1330, 34 Sup. Ct. 821, where the question of state regulation of rates of ferriage over a boundary stream between two states, was involved and determined. *Burlington, etc. Ferry Co. v. Davis*, 48 Iowa 133, 30 Am. Rep. 390; *State v. Faure*, 54 W. Va. 122, 46 S. E. 269, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104; *Newport v. Taylor*, 16 B. Mon. (Ky.) 699; 11 R. C. L. 918.

It follows that the franchises under which the plaintiff claims to hold the ferry rights alleged by him to have been violated by the defendants, are without force, they being beyond the power of the General Assembly of this State to grant. This being so, the allegations show no ferry rights in the plaintiff that have been disturbed by the defendants, and the bill is without equity.

Decree reversed and cause remanded with directions that the demurrer be sustained, the bill adjudged insufficient and dismissed with costs to the defendants.

VICTOR VILLA v. GUY THAYER.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 8, 1917.

Game Wardens—Authority—Killing Dogs—Charge of Court.

A game warden, not being a general public officer of the State, and his authority being wholly derived from the statutes and expressly defined thereby, cannot justify his shooting of dogs on the ground that they were at the time chasing a wild deer which could not reasonably be protected otherwise; nor upon the ground that the dogs had before chased deer and were public nuisances.

Nothing is to be deemed a public nuisance solely by reason of its relations to the destruction of wild game unless the statute law declares it to be so.

Charge construed, and held to be without error.

ACTION on the case for killing two dogs belonging to plaintiff. Pleas, the general issue, and two special pleas, the first of which alleged that defendant was a deputy fish and game warden and as such performed the acts complained of, and that the dogs were, at the time of the shooting, in the act of pursuing a wild deer, and for a long time theretofore had been in the habit of pursuing wild deer and were possessed by the plaintiff for that purpose and did so with the knowledge and consent of the plaintiff, by reason of which the dogs were public nuisances. The second special plea alleged that the dogs were not duly licensed, registered and collared. Trial by jury in the Montpelier City Court, *Erwin M. Harvey*, Judge. Verdict and judgment for plaintiff. Defendant excepted. The opinion states the case.

H. J. Conant and *F. L. Laird* for defendant.

Charles B. Adams and *J. Ward Cower* for plaintiff.

HASELTON, J. This is an action of tort in which the plaintiff recovered damages for the shooting of two dogs duly licensed, registered and collared.

On trial the defendant admitted shooting the dogs, but claimed to justify such shooting on the ground that he was a deputy game warden, and as such shot the dogs while they were chasing a wild deer, and that the defendant could not reasonably protect the deer in any other manner than by shooting the dogs. The court held that evidence to support these claims constituted no defence and the defendant excepted.

At one time our statutes permitted any person to kill any dog found hunting a deer. Acts 1898, No. 108, § 3; *Mossman v. Bostridge*, 76 Vt. 409, 57 Atl. 995. But this provision of the law was soon repealed and has never been restored. Acts 1904, No. 130; P. S. 5325; Acts 1912, No. 201, §§ 13, 17. The defendant, however, claimed and claims that it was within his authority as a deputy game warden to shoot the dogs while chasing a deer. He does not claim that he had that authority by virtue of any express statutory provision for there is no such provision, and the powers and duties of game wardens are carefully defined; but he claims that as wild deer within the State are the common property of the people of the State, (*State v. Theriault*, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695; *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656; *State v. Niles*, 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917; *Zanetta v. Bolles*, 80 Vt. 345, 67 Atl. 818) the State may do in defence of such property what a private person may do in defence of his private property. But a game warden is not the State nor a general public officer of the State, and his authority in the protection of game is wholly derived from the statutes and is expressly defined thereby. Acts 1912, No. 201, § 73. If it is desirable that game wardens should have authority to do what the defendant here did, it is for the General Assembly and not for the courts to confer it. The claim, above stated, was raised by an exception which, however, is of no avail.

The defendant in his brief says, in substance, that on trial he offered to show that these dogs had before chased deer, and he claims that, as deer-chasing dogs, they were public nuisances and might lawfully be shot by any one. We do not, however, find in the record any exception that fairly calls for the consideration of this claim. But if we treat the question as raised by any exception to any ruling, holding or instruction of the court adverse to this claim of the defendant, the result is the same. Sec. 3, No. 108, of the Acts of 1898, already referred to,

forbade, among other things, the keeping of deer-hunting dogs, but restricted the right of a private person to kill a dog by virtue of that statutory provision to the killing of a dog found in pursuit of a deer. The other provisions of the section related only to the penalty of the statute. *Mossman v. Bostridge*, 76 Vt. 409, 57 Atl. 995. It cannot be held that the repeal of the only clause giving a private person the right to kill for the protection of deer is consistent with the right to kill in some circumstances for such protection.

The enforcement of the fish and game law is in most respects by way of visiting penalties, in some cases severe, upon those who violate it. In a few instances forbidden contrivances for taking fish and game are declared to be public nuisances which any person may destroy, and nothing is to be deemed a public nuisance solely by reason of its relation to the destruction of wild game unless the statute law declares it to be so.

The court directed the jury to find a verdict for the plaintiff for at least nominal damages, saying: "The usual rules applicable to causes of this kind, that the burden is upon the plaintiff to make out his case by a fair balance of the evidence, do not apply, because the court charges you, as a matter of law, that you shall find at least nominal damages for the plaintiff." To this the defendant excepted and now says that it was error since the only question left to the jury was the question of the value of the dogs and that on that question the burden of proof was on the plaintiff. But the court was not talking about damages, but about the making out of a case, that is, the question of the defendant's liability, and was simply explaining to the jury why he did not submit that question to their determination. The charge on the question of damages was not prejudicial.

Judgment affirmed.

HOWARD NATIONAL BANK v. CECELIA ARBUCKLE.

October Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 7, 1917.

Bills and Notes—Liability of Indorser after Discontinuance of Suit against Maker.

The fact that the payee of a promissory note, after having sued the maker thereon and attached sufficient of the latter's property to pay the claim in full, joined in a petition to have the maker adjudged a bankrupt, by which adjudication the attachment was released and the other creditors enabled to participate in the avails of the property, does not release an indorser upon the note from liability thereon.

A creditor who, without request of the surety, has commenced an action against the principal upon a note may, acting in good faith, discontinue it without prejudice to his rights against such surety, although property of the principal was attached thereunder.

CONTRACT on a promissory note indorsed by defendant. Special plea, that defendant was released from liability by reason of the discharge of an attachment previously made in a suit on the note, brought by plaintiff against the maker. Trial by court at the March Term, 1917, Chittenden County, *Butler, J.*, presiding. Judgment for plaintiff on facts found by the court. Defendant excepted. The opinion states the case.

Ezra M. Horton for defendant.

Max L. Powell for plaintiff.

POWERS, J. In this action, the plaintiff seeks to recover on a promissory note for the sum of \$2,500, signed by the Arbuckle Company, a corporation, and indorsed by the defendant. This note was not paid when it fell due, and was protested, and due notice was given the defendant. The facts were found by the court below, and therein it is stated that on May 4, 1916, the

plaintiff brought a suit against the Arbuckle Company predicated upon this and other notes. It is difficult to see how this note could have been covered by that suit, as it was not then due; but the date of the bringing of the suit may have been inadvertently misstated, and we accept the statement as correct. On May 11, 1916, the plaintiff joined in a petition to have the Arbuckle Company adjudged a bankrupt, and in due course the adjudication was made, and the attachment, which covered property enough to pay the plaintiff in full, was thereby dissolved. The defendant had nothing to do with any of these legal proceedings and knew nothing about them. The only question submitted to us is: Did this action of the plaintiff whereby the attachment was released, discharge the defendant from liability under her indorsement?

Though it may be otherwise in some jurisdictions, it is the settled law of this State that a creditor who, without request of the surety, has commenced an action against the principal upon a note may, acting in good faith, discontinue it without prejudice to his rights against such surety, though property of the principal was attached thereunder. This is the unmistakable doctrine of *Bank of Montpelier v. Dixon*, 4 Vt. 587, 24 Am. Dec. 640, and *Baker's Ex'rs v. Marshall*, 16 Vt. 522, 42 Am. Dec. 528, and has never been departed from by this Court. The same thing is held in *Barney v. Clark*, 46 N. H. 514; *Lawson v. Snyder*, 1 Md. 71; *Page v. Webster*, 15 Me. 249, 33 Am. Dec. 608. See, also, *Fulton v. Matthews*, 15 Johns. (N. Y.) 433, 8 Am. Dec. 261; *Bellows v. Lowell*, 5 Pick. (Mass.) at p. 311.

That the effect of the plaintiff's action was to enable the general creditors to participate in the avails of the property attached does not distinguish this from the cases referred to. Counsel make no reference to the Negotiable Instruments Act No. 99, Acts 1912, in this connection, so we give it no attention.

Judgment affirmed.

HOWARD NATIONAL BANK v. CECELIA ARBUCKLE.

October Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 7, 1917.

Bills and Notes—Alteration—"Material Particular"—Negotiable Instruments Act—Prima Facie Authority of Bank Cashier to Fill Blank in Note.

The term "material particular" as used in Sec. 14 of the Negotiable Instruments Act referring to blanks which the holder has *prima facie* authority to fill does not mean such as may be necessary to make the instrument a negotiable note, but includes any particular proper to be inserted in such an instrument.

Under the Negotiable Instruments Act, a bank cashier has *prima facie* authority to fill a blank in a promissory note payable to the bank by inserting therein the time for which the note is to run, and his act in so doing does not render the note unenforceable against an indorser thereon.

CONTRACT on a promissory note, indorsed by defendant. Special plea, that the cashier of the plaintiff bank had altered the note in a material particular. Trial by court at the March Term, 1917, Chittenden County, *Butler, J.*, presiding. Judgment for plaintiff on facts found by the court. Defendant excepted. The opinion states the case.

Ezra M. Horton for defendant.

Max L. Powell for plaintiff.

POWERS, J. This case was heard with the case between the same parties reported *ante*, p. 84, 102 Atl. 476. It is predicated upon a note for \$1,150, signed by the Arbuckle Company, and indorsed by the defendant. When this note was prepared a printed blank was used, and when delivered by the signer to the plaintiff it read, "_____ after date we promise to pay," etc.,—there being a blank line standing before the words "after

date." The note was delivered to the plaintiff by the treasurer of the Arbuckle Company and the note renewed by it was not surrendered, because the treasurer told the plaintiff's cashier that he was giving the new note to prevent protest of the old one, and that he expected to pay it in a few days. He also told the cashier that if he wanted to run the new note through the books of the bank he might fill the blank above referred to. The note was not paid, and a few days short of four months after it was given, the cashier inserted the words "four months" in the blank, and thereupon cancelled the old note on the books and entered the new one in its stead. The defendant insists that this act of the cashier in inserting the words in the blank, being unauthorized by her, amounted to a material alteration of the instrument and rendered it unenforceable against her. This note, like the one in the other case, was given since the passage of the Negotiable Instruments Act (No. 99, Acts 1912) which controls the rights of the parties.

Section 14 of that act is sub-titled "Blanks; When may be filled," and provides that if "the instrument is wanting in any material particular, the person in possession thereof has *prima facie* authority to complete it by filling up the blanks therein." The term "material particular" as here used does not mean such as may be *necessary* to make the instrument a negotiable note, but includes any particular *proper* to be inserted in such an instrument. 1 Dan. Neg. Instr. (6th ed.) 144, n. 86; 8 C. J. 187; *Johnston v. Hoover*, 139 Ia. 143, 117 N. W. 277. In the case cited, the instrument contained a promise to pay a certain sum "at _____"; and the words "Des Moines, Iowa" were, after delivery, inserted therein. It was held that a statute like ours gave *prima facie* authority to fill the blank in this way. *Bloom v. Horwitz*, 166 N. Y. Supp. 786, is directly in point, and it was therein held that the holder of the instrument had *prima facie* authority under a statute like ours, to fill in the blank before the words "after date," and that this was not an "alteration" of the note. No question is made as to the space before the words "after date" being a blank within the meaning of the law, and could not well be, as this is obvious from an inspection of the instrument and indicated by the treasurer's statement to the cashier. It is also apparent that the acceptance of the note by the plaintiff did not become complete until the old note was cancelled as above stated.

We find nothing to criticize in the reasoning of the cases above cited, and agree that it is especially desirable that we follow them. *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913 C, 525.

We hold, therefore, that the cashier had *prima facie* authority to do as he did, and there being nothing found to the contrary, the defendant's exception cannot be sustained.

It should be noted, in passing, that even before the passage of the Negotiable Instruments Act, this blank in the note carried with it evidence of authority on the part of the holder to fill it in as was done. *Michigan Ins. Co. v. Leavenworth's Est.*, 30 Vt. 11.

The other point made in argument is ruled against the defendant by the decision in the other case.

These being the only questions raised, none other is considered.

Judgment affirmed.

A. A. ROBERTS v. OLIVER DANFORTH.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 11, 1917.

Practice Act—Question Raised Thereunder—Malicious Suing Out of Body Writ—When Action Not Maintainable—Appeal and Error—Demurrer—Amendment.

The question whether a special plea amounts to the general issue cannot be raised under the Practice Act.

An action of tort for the malicious suing out of a body writ for a much greater amount than any claim the plaintiff therein had probable cause to suppose he had against the defendant, cannot be sustained while the original action is pending.

The Supreme Court sits only as a court for the correction of errors, in a case brought upon exceptions and passes only upon the case that was before the court below; and therefore will not consider an amendment to a declaration, made in the trial court after a ruling

sustaining a demurrer, although the parties have stipulated that the amendment may be considered as if made before the ruling.

CASE. Plea, the general issue and a special plea. Heard on demurrer to the special plea at the June Term, 1916, Bennington County, *Fish, J.*, presiding. Demurrer overruled, *pro forma*, and plea held sufficient. Plaintiff excepted. The opinion states the case.

Holden & Healey and *F. C. Archibald* for plaintiff.

It was not necessary to aver or prove the termination of the first suit. *Grainger v. Hill*, 4 Bing. N. Cases, 212, 7 L. J. C. P. 85; 5 Scott 561, 33 E. C. L. 675; 26 Cyc., p. 57, n. 17, p. 77, n. 59, p. 13, n. 71; *Bump v. Beets*, 19 Wend. 421; *Fortman v. Rollier*, 8 Ohio State 548, 72 Am. Dec. 606; *Sneeder v. Harris*, 109 N. C. 349, 14 L. R. A. 389; *Forrest v. Coolier*, 20 Ala. 175, 56 Am. Dec. 190; 6 Corpus Juris, p. 501, para. 1183, p. 519, para. 1260, p. 499, n. 11; *Zinn v. Rice*, 154 Mass. p. 1, 12 L. R. A. 288, 4 L. R. A., note p. 256; *Antcliff v. June* (Mich.), 10 L. R. A. 621; Note VII, 62 L. R. A. 721; *Jackson v. Amer. Tel. & Tel. Co.*, 139 N. C. 347, 70 L. R. A. 738; *Malone v. Belcher*, 216 Mass. 209, 49 L. R. A. (N. S.), p. 753.

Robert C. Bacon for defendant.

The action cannot be maintained while the original suit is pending. *Rea v. Lewis*, Minor (Ala.) 382; *Wall v. Toomey*, 52 Conn. 35; *Feazle v. Simpson*, 2 Ill. 30; *Nolle v. Thompson*, 3 Mete. (Ky.) 121; *Spring v. Besore*, 2 B. Mon. (Ky.) 551; *McCracken v. Bank*, 4 Fed. 602; *Rossiter v. Paper Co.*, 37 Minn. 996; 33 N. W. 855; *Kelley v. Osborne*, 86 Mo. App. 239; *Free-mark v. McKinney Co.*, 55 Mo. App. 435; *Donnegan v. Armour*, 3 Ohio Cir. Ct. 432; *Sloan v. McCracken*, 7 Lea (Tenn.) 626; *Wright v. Harris*, 160 N. C. 542, 76 S. E. 489; Cooley on Torts, 2nd Ed., 219; *McBean v. Ritchie*, 18 Ill. 114; *Driggs v. Burton*, 44 Vt. 124; *Gillispie v. Hudson*, 11 Kan. 163; *Sharpe v. Johnston*, 76 Mo. 660; *Hardin v. Borders*, 23 N. C. 143; *Woodworth v. Mills*, 61 Wis. 44; *Vanderbilt v. Mathus*, 5 Duer (N. Y.) 304; *Monroe v. Maples*, 1 Root (Conn.) 553; *Crescent Co. v. Builders Co.*, 120 U. S. 141; *Wood v. Bailey*, 144 Mass. 365; *Grainger v. Hill*, 4 Bing. New Cases 212; *Abbott v. Kembell*, 19 Vt. 551.

HASELTON, J. This is an action of tort in one count. The defendant filed the general issue and a special plea. To the special plea the plaintiff demurred. His demurrer was overruled, *pro forma*, the plaintiff excepted, and the cause was passed to this Court before final judgment.

The declaration sets out that the plaintiff, while in the employ of one Wise, was engaged in cutting timber on a certain piece of land owned by Wise; that, however, the defendant claimed ownership of the land, which so was in dispute; that the defendant, well knowing that, if his claims were good, the damage to him from the cutting and other acts complained of by him could not exceed fifty dollars, maliciously, etc., brought a suit therefor in trespass for four thousand dollars against the plaintiff and others and caused the plaintiff to be arrested on the *capias* writ issued therein; that the plaintiff was unable to procure bail in so large a sum as four thousand dollars, and was by the direction of the defendant and by virtue of the writ committed to jail and detained therein for a time named. Matters of aggravation and detail are not material to the questions now here presented.

The ground of the defendant's special plea is that the trespass suit is pending. The demurrer, which was overruled goes upon two specified grounds, first, that the plaintiff is entitled to maintain this action notwithstanding the pendency of the trespass suit, and secondly, that if the pendency of the trespass action prevents the plaintiff from maintaining this action, then the special plea is bad as amounting to the general issue. Counsel do not take much time with the second ground of demurrer nor do we. The question that a special plea amounts to the general issue and is therefore bad cannot be entertained under the Practice Act, for thereunder a plea or answer is good, so far as form is concerned, if it is "a brief and simple statement of the facts relied on in defence."

The soundness of the first ground of the demurrer depends upon the nature of the tort alleged. The declaration is in form an action on the case, and the case sought to be stated is for malicious procedure without probable cause. The declaration is not for false imprisonment nor for the abuse of process since all that was done after the issue of the process was done pursuant to it.

The fundamental tort alleged is the malicious suing out of a

body writ for nearly a hundred times the amount of any claim the defendant had probable cause to suppose he had against the plaintiff. *Austin v. Debnam*, 3 B. & C. 139; *Savage v. Brewer*, 16 Pick. (Mass.) 453, 28 Am. Dec. 255; *Tomlinson v. Warner*, 9 Ohio 104. The declaration is essentially a declaration for malicious prosecution, though where, as here, an arrest follows the malicious prosecution, the tort is commonly called malicious arrest. The distinction is mainly one of phraseology and is immaterial here. 2 R. C. L. 12.

That a malicious arrest and a malicious prosecution are essentially one in principle and that they are clearly distinguishable from malicious abuse of process is made sufficiently clear in *Grainger v. Hill*, 4 Bing. (N. C.) 212. The suit here is of such a character that it cannot be maintained while the original action is pending, for the result of that action may show that the plaintiff has no grievance. The rule applicable to cases of malicious procedure is well stated in 2 L. R. A. (N. S.) in a note at page 948. The rule given there, a rule supported both by reason and authority, is this: "Where the plaintiff's grievances have nothing to do with the result of the original action, he may go ahead without regard to it, otherwise not." It follows that the action here cannot be sustained while the original action is pending and that the defendant's special plea is good. The damages, if any, that the defendant is entitled to in his trespass suit are to be determined there and not in this suit or in some later of a series of suits.

In this Court, the parties stipulate that the plaintiff's declaration may be amended by incorporating into it an averment that, on a date which was the date of the termination of the plaintiff's imprisonment as alleged, the assistant judges of the county court reduced the bail in the action complained of to four hundred dollars, that the plaintiff furnished bail in that amount and was discharged from custody. Counsel also stipulate as to other amendments, all to be treated as if made before the defendant's pleas were filed and the subsequent proceedings had. But, in a case brought here on exceptions, we sit only as a court for the correction of errors, and pass only upon the case that was before the court below. *Alfred v. Alfred*, 87 Vt. 542, 90 Atl. 580; *State v. Webster*, 80 Vt. 391, 67 Atl. 1098.

The judgment overruling the plaintiff's demurrer is affirmed and the cause is remanded.

VERMONT BOX COMPANY v. WILBUR E. HANKS.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, JJ., and
WILSON, SUP. J.

Opinion filed October 10, 1917.

Jury—Challenge to Array—Drawing Jurors—Evidence—Admissibility—Declarations of Agent—Witnesses—Explanation of Testimony—Exceptions—When Unavailing—Instructions—Requests—When Properly Refused—Fraud—Falsity of Representations.

A challenge to the array is not required to be in writing, but it is sufficient if the grounds of the challenge are stated with sufficient fullness and definiteness reasonably to inform the court and the adverse party of the precise departure from the legal requirements relied upon, and are taken down by the court stenographer.

It is not essential to the validity of a challenge to the array that it be accompanied by affidavits, because proof of the illegal acts upon which the challenge is based may be made by oral testimony.

After a party has taken a challenge to the poll, he cannot as of right challenge the array; but even where the ground is previously known to the challenging party, the court may, in its discretion, permit a challenge to the array after challenges to the polls have been exercised and before the jury is sworn.

A party to an action to be tried at a term of court is disqualified from participating in any manner in the drawing or summoning of the jurors to serve at the same term; and so it is error, on a challenge to the array, to exclude offered evidence that the jurors were selected by drawing their names in the presence of defendant, by either the clerk of court or the sheriff, and only those drawn who were reported to be all right by the defendant, or others present, because, if the acts charged were proved, the array should have been quashed.

In an action for fraud in misrepresenting the boundary of land sold by defendant to plaintiffs, evidence that the agent of the defendant, when sent upon the land by defendant to show it to plaintiffs' representative, understood that one boundary of the land was a town line, and so told plaintiffs' representative, is admissible.

In such case evidence is admissible that, after the purchase by plaintiffs, they sent the same man who had acted as defendant's agent upon the land to point it out to prospective purchasers, and that he told them where the line was, as he had told plaintiffs' representative.

The statement of an agent, made in the performance of the duties of his agency, cannot be proved by his subsequent statement upon the same subject matter when acting as the agent of another principal.

In an action for fraud in the sale of land, where defendant testified that he told the plaintiffs that the land in question ran "to the Fayston line and to the pulp company line," it was not error to permit his own counsel to ask him what line of the pulp company he meant, in order to make his meaning clear.

Where no ground of objection to evidence is stated, and it cannot be said that the evidence is wholly irrelevant and immaterial, an exception thereto will not be sustained.

An exception to a portion of the charge, which requires an examination of the evidence, will not be considered where the excepting party does not, in his brief, make specific reference to such parts of the evidence as he deems material, as required by County Court Rule 6, Par. 5.

It is not error to fail to comply with a request to charge, which is simply a statement of an abstract principle of law without reference to the matter of the context, and without anything to indicate how the jury should apply it to the evidence in the case.

In an action for fraud in the sale of land, a request to charge which included the right of plaintiffs to rely upon representations of defendant regarding lands not involved in the case, was inapplicable and rightly refused.

In an action for fraud in the sale of land, a requested instruction, that if defendant represented that he had personal knowledge as to the eastern boundary of the land, being aware that he had not such knowledge, his representation was fraudulent, although he stated the boundary as he believed it to be, was properly refused, because the element of the falsity of the representation was omitted.

Mann v. Fairlee, 44 Vt. 672, distinguished.

TORT for fraudulent representations in the sale of real estate. Plea, the general issue. Trial by jury at the June Term, 1916, Addison County, *Miles*, J., presiding. Verdict for defendant. Plaintiffs excepted. The opinion states the case.

Charles I. Button and John W. Redmond for plaintiffs.

The court should have heard the testimony offered by plaintiffs to show that the jury were improperly drawn. *Jones v. State*, 3 Blackf. (Ind.) 37; *Gardner v. Turner*, 9 Johns. (N. Y.) 260; *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293; *Eaton v. Commonwealth*, 6 Binney 447; *McDonald v. Shaw*, 1 N. J. L. 6; Question whether the jury were properly drawn, 1 Brown (Pa.) 121; *Pringle v. Huse*, 1 Cowan (N. Y.) 432; *Mann v. Fairlee*, 44 Vt. 672.

The court erred in holding the statute directory rather than mandatory. *Moore v. Navassa Guano Co.*, 130 N. C. 229; *U. S. v. Hargo*, (Okla.) 98 Pac. 1021, 20 L. R. A. (N. S.) 1014.

Robert W. McCuen, James B. Donoway and Rufus E. Brown for defendant.

The plaintiffs waived their right to challenge the array by failing to do so until after they had taken challenge to the poll. *Cooley v. State*, 38 Tex. 636; Coke Litt. 158; Bacon's Abr. tit. "Juries," Ch. 11; *People v. Roberts*, 6 Cal. 214; Thompson & Merriam on Juries, §§ 266, 275; *State v. Wright*, 45 Kan. 136; *State v. Clark*, 121 Mo. 513; *State v. Taylor*, 134 Mo. 109; *People v. McKay*, 18 Johns. 218; *Gropp v. People*, 67 Ill. 160; *Muller v. Rebhan*, 94 Ill. 192; *Watkins v. Weaver*, 10 Johns. 107; *State v. Davie*, 41 Iowa 315; *State v. Bryan*, 40 Iowa 379.

WATSON, C. J. This is an action of tort based on fraudulent representations in the sale of real estate. The case was docketed in Addison County court on October 12, 1915, and was tried by jury at the June Term, 1916. Before and at the time of the trial, the defendant was one of the assistant judges of that court. During the impaneling of the jury, and after counsel for the plaintiffs had examined some of the jurors on the *voir dire*, and had exercised five challenges to the polls, the plaintiffs challenged the array, on the ground that the defendant was present and assisted in the selection of the array of jurymen for the term, and in support of this challenge offered to show that the jurors were selected by drawing the names in the presence of the defendant, either by the clerk of court or the sheriff, they both being present, looking at the names and discussing them before it was decided

whether they would be jurors or not. The challenge was disallowed, the exception saved. The plaintiffs then in effect repeated their challenge to the array (though not stating it as fully and definitely as before), and in support thereof offered to show that the jurors were not chosen according to the statute, but that the different jurymen elected by the various towns were discussed as their names were drawn from the respective boxes, as to whether they were suitable jurymen or not, those being summoned who were reported to be all right by the defendant, or the sheriff, or others present, the plaintiffs claiming that it was irregular for anyone except the sheriff and the clerk to take part in the selection and summoning of the jurors, under the statute. The court seems then to have considered the matter of such challenge *de novo*, and (coming in the next morning) held that the statute was directory rather than mandatory, and disallowed the challenge, to which an exception was saved to the plaintiffs, and the jury impaneled.

The statute provides particularly how the names of grand and petit jurors returned by the clerks of the several towns of the county to the county clerk, shall be arranged and kept by the latter in boxes, and that, within the time specified, the sheriff or his deputy shall, "at the office and in the presence of the clerk of the county, draw out of the 'boxes' the number of names required to be summoned from the towns respectively; and the county clerk shall issue a venire commanding such officer to summon the persons so drawn." Except that if a person drawn is absent or sick so that probably he can not attend the court, or if he has within two years been drawn as a juror from a town of more than two hundred inhabitants, his name shall be returned to the box and another drawn and summoned. P. S. 1468-1470.

It is said in Coke upon Littleton (156. a.), that "if any one or more of the jurie be returned at the domination of the partie, plaintife or defendant, the whole array shall be quashed. So it is if the sherife returne any one, that he be more favorable to the one than the other, all the array shall be quashed." The same grounds of challenge to the array are stated in Bacon's Abridgment, Vol. 5, Juries, E. 1; in Blackstone, Book III, 359; and in Stephen's Com. (8th Ed.) Vol. 3, 540. It is urged that the challenge was properly dismissed for that (1) it was not in writing; (2) no affidavits in support of it were submitted; (3) the plaintiffs did not accept the offer of the court to hear the

testimony and try the question raised by the challenge; and (4) the right of the plaintiffs to challenge the array was waived by previously proceeding to examine jurors on the *voir dire*.

Concerning the third ground stated, it is enough to say that obviously the court below did not so treat the matter in finally disposing of the challenge.

Under our practice such challenges are not required to be in writing. The grounds of challenge should be sufficiently full and definite reasonably to inform the trial court and the adverse party of the precise departure from the legal requirements relied upon. Very likely it is the better way to reduce the challenge to writing; but if it be stated with the required fullness and definiteness,—concerning which no question is raised in this case,—and taken down by the stenographer of the court, as it fairly appears to have been done in this instance, it is sufficient. *Ullman v. State*, 124 Wis. 602, 103 N. W. 6. Nor was it essential to the validity of the challenge that it be accompanied by affidavits proving the alleged illegal acts upon which it is based. It devolved upon the challenger to make such proof, but this could be done by oral evidence or by affidavits. *Borrelli v. People*, 164 Ill. 549, 45 N. E. 1024. The record shows that on the first day of the term, and before this case was called for trial, one of the plaintiffs' attorneys was informed and believed that the defendant was present and assisted the sheriff and the clerk of the court, in the selection of the jurors drawn to hear causes at that term; and that notwithstanding this, the challenges to the array were not made until after the plaintiffs had exercised several challenges to the polls. The rule seems to be firmly established that after a party has taken a challenge to the poll, he can not as a matter of right challenge the array. Co. Litt. 158. a.; Bac. Abr. Juries, E.

The case of *Mann v. Fairlee*, 44 Vt. 672, is relied upon as an authority to the contrary. But it is not so. There one of the jurors who sat in the case was, by mistake of the sheriff, summoned to serve as a juror at the term of court, the sheriff supposing he was the man of that name drawn, when in fact he was a different person from the same town and having the same name, except he had no middle name, as did the one drawn. There was no collusion or fraud on the part of any one, and neither party to the case was aware of the mistake till after the verdict was rendered and the jurors discharged from service in the cause.

This Court said that "where a person is legally competent to act as a juror, but was irregularly selected, and the irregularity becomes known before the verdict is rendered, a new trial will be granted on motion by either party, unless the party making the motion has expressly waived all objection to the juror arising from the irregularity in the manner of his selection." In such circumstances the objection goes to a single juror. It does not affect the whole panel, and so not a ground of challenge to the array. Whether a challenge of the latter class can, as matter of right, be taken after challenge to the poll, in case the ground therefor be not earlier known, we need not consider, for such want of knowledge is an element not in the case before us. Yet we think that when no such want of prior knowledge exists, it is within the discretionary power of the court to permit a challenge to the array after challenges to the polls have been exercised and before the jury is sworn (see *Brunskill v. Giles*, 9 Bing. 13; *Mayor, etc. of New York v. Mason*, 4 E. D. Smith, 142; *Cox v. People*, 80 N. Y. 500), and that this is what the court did in the instant case. In ruling upon the challenge, the court said: "We feel that the motion pending before us, if the matter was regularly raised, would not justify us in discharging the array. We feel that the statute is directory rather than mandatory, and that it is hardly sufficient that an irregularity might exist in the call,—that is the only ground that is raised,—that would justify the court in discharging the array; we therefore overrule the motion, and an exception is given the plaintiffs, and the jury impaneled."

Thus it appears that the court considered the challenge and disposed of it on specified grounds other than that it was not seasonably made, or that the right to exercise such challenge had been waived.

But whether the statute be directory or otherwise makes no difference with the character and the effect of the acts (if established) of the sheriff in allowing the defendant to participate in the manner offered to be shown, in arraying the jurors. The plaintiffs were entitled to have their case tried by an impartial jury composed of men selected as contemplated by law, without any direction or influence of the defendant. It requires no argument to convince any person having a proper respect for law, and the due administration of justice, that a party to an action to be tried at a term of court, is disqualified from participating

in any manner in the drawing or summoning of the jurors to serve at the same term. If the facts offered to be shown regarding the acts of the defendant in connection with the sheriff in arraying the jurors had been established, a more flagrant attempt at selecting the whole panel in the interest of one having a cause to be tried by jury, can not well be imagined. The evidence should have been received, and if the unlawful acts charged be proved, the array should have been quashed. The ruling of the court in this respect was reversible error.

The plaintiffs seek to recover damages to the amount of the value of a tract of land situated between the top of the mountain in the town of Huntington and Avery's Gore, on the west, and the town line of Fayston, on the east. Their evidence tended to show that the defendant represented that he was selling this tract as part of lands conveyed to them by his warranty deed, dated December 16, 1912, and marked "plaintiffs' exhibit 10"; that the plaintiffs fully relied upon these representations as to the ownership and value of said tract in the purchase; and that they afterwards bargained to sell this tract with other lands covered by the deed mentioned, upon the said representations of the defendant. The plaintiffs' evidence further tended to show that said tract of land, as they ascertained after they had so bargained, did in fact belong to the Champlain Realty Company, whereby they were obliged to discount the sale price of the premises covered by their bargain of sale, to the extent of fourteen hundred dollars, in order to prevent a rescission of the entire trade.

The defendant claimed that he did not represent to the plaintiffs that he owned the land in dispute; that he made no representations with reference to any particular tract of land or boundaries thereof; and that the plaintiffs did not rely upon anything he may have said to them in reference to the location of the land or the boundaries, but relied upon what their agent, Mr. Quinlan, reported after he had examined the property and reported his findings.

The plaintiffs' evidence tended to show that the defendant told one of the plaintiffs, when negotiations were going on between them for the sale by the former of his lands to the latter, that Benjamin Trombley was acquainted with the land, knew approximately where the boundaries were, and would show the plaintiffs the property and the boundaries, and that defendant would arrange to have Trombley go onto the property for this

purpose, with the plaintiffs, at any date they might set. Defendant testified that in consequence of a talk he had with the Thomas boys or one of them, he sent Trombley upon the mountain for the purpose of showing them the land he owned. Trombley was called as a witness by the plaintiffs and testified to being sent by the defendant on to the land owned by him, to show it to Quinlan, and to staying on the land with him two days looking it over. It appeared that Quinlan was there as the representative of the plaintiffs. The plaintiffs then offered to show by the witness that when he went up there on that occasion he understood that the east line of defendant's property, then being negotiated for, was the west line of the town of Fayston, and that he so told Quinlan at the time. The offer was excluded and exception saved. This exception must be sustained. Under the offer, the witness being on the land as the agent of the defendant to show it to Quinlan, the plaintiffs' representative, his acts and declarations within the scope of his agency, were the acts and declarations of the defendant, and in law admissible in evidence. *Newton v. American Car Sprinkler Co.*, 88 Vt. 487, 92 Atl. 831; *Taplin & Rowell v. Clark*, 89 Vt. 226, 95 Atl. 491. Nor did the element (contained in the offer) of the understanding of the witness, at the time he was in the performance of the duties of his agency, render the offer unsound. This man had been put forth by the defendant as one who knew approximately where the boundaries of defendant's lands were, and his understanding in that regard, when acting in the execution of his agency, was the understanding of his principal, and could properly be shown in evidence in connection with what he said and did, as bearing upon the understanding of the parties as to the property within the sale. *Linsley v. Lovely*, 26 Vt. 123; *Wheeler v. Campbell*, 68 Vt. 988, 34 Atl. 35; *Newton v. American Car Sprinkler Co.*, cited above; *Utley v. Donaldson*, 94 U. S. 29, 24 L. ed. 54.

The plaintiffs showed that after their purchase of the defendant, they sold the same land to Doe Brothers and Stevens, and that in making the sale they sent the same man Trombley on to the land to point it out to the purchasers, and that he told them where it lay just the same as he told Quinlan; that at that time indications were made by Trombley to Mr. Doe and Mr. Stevens as to where the eastern boundary of the tract they were about to purchase was. Stevens, called as a witness by the

plaintiffs, having so testified, was asked where the eastern boundary indicated by Trombley on that occasion was. Objection being made, plaintiffs offered to show that Trombley then pointed out the east boundary of the land to be the Fayston town line. The purpose of the evidence offered was stated to be, as establishing that the plaintiffs relied upon the representations made to them, to the effect that the eastern boundary of the land of the defendant, which he was selling to them, was the line of the town of Fayston. One of the plaintiffs testified that they sent Trombley to show the land and its boundaries, on that occasion, because he was better acquainted with it than they were. Can there be any doubt that such pointing out of the east boundary would have been a fact proper to be shown for the purpose named, had it been done by the plaintiffs themselves? Yet what was done by the agent in this regard was done by the principal through him, and was none the less admissible in evidence. The exclusion of the offered evidence was error.

Fred Doe, one of the Doe Brothers, was called as a witness by the plaintiffs, and testified to Trombley's showing to himself and Stevens the property on the occasion last mentioned. Plaintiffs' counsel asked the witness what, if anything, Trombley told him was the east boundary of the Hanks property. Objection being made, counsel said they offered the evidence for the purpose, in short, of showing what Trombley, when showing the property to Quinlan on the occasion mentioned above, in fact told Quinlan as to where the east boundary of defendant's land was, Trombley having testified that he subsequently told Doe Brothers and Stevens the same that he told Quinlan. This offer was excluded and exception saved. In this ruling there was no error. The statement of an agent made in the performance of the duties of his agency, can not be proved by his subsequent statement upon the same subject matter when acting as the agent of another principal. For such purpose, the latter statement would be hearsay, and none the less so by the fact that the person who acted as such agent testified that it was the same as his first statement.

The defendant, when called to the witness stand by the plaintiffs, testified to telling the plaintiffs that his land run to the Fayston line and to the pulp company line. On being examined by his own counsel, he was asked: Q. "When you spoke of the land running to the Fayston line and to the pulp company,

what line of the pulp company did you mean?" Subject to plaintiffs' exception, he answered, "I meant it run to the Fayston line and the pulp company's line, I didn't know where the pulp company's line was." To prevent any claim by the other side that the defendant used the expression "Fayston line and the pulp company's line" as indicating one concurrent line, instead of two lines, one in extension of the other, it was not error to permit his counsel to ask the foregoing question, to the end that the defendant might make his meaning clear.

Defendant called as a witness one George E. Bartlett, and, in the course of his examination, asked him whether or not during the past five or six years there had been any claim made with respect to the division line claimed by the Champlain Realty Company, and himself as the owner of lots 14, 15, 16, and 17. Plaintiffs objected to the question, but stated no ground of their objection; and on its admission, saved an exception. Under the claims made by the defendant as to the force of the evidence given by the witness in answer, we can not say it was wholly irrelevant and immaterial. The exception is therefore unavailable. *Douglass & Varnum v. Village of Morrisville*, 89 Vt. 393, 95 Atl. 810.

Exception XI to the charge requires an examination of evidence to determine whether there was such evidence as the exception states as the basis for the charge claimed. But the plaintiffs do not, in their brief, make specific reference to such parts of the evidence as they deem material, giving the page, etc., as required by Rule 6, paragraph 5. The exception is therefore not considered.

The 12th exception is to the court's failure to charge according to the plaintiffs' fourth request. This request is simply a statement of an abstract principle of law, without reference to the matter of the context, and without any thing to indicate how the jury should apply it to the evidence in the case. The failure so to charge was not error. *Lang v. Clark*, 85 Vt. 222, 81 Atl. 625.

The plaintiffs excepted to the failure of the court to give the substance of their sixth request, reading as follows: "The jury are instructed that it was the privilege and right of the plaintiffs to rely upon the representations made by the defendant as to the location and boundaries of his land, including his eastern boundary which is here in dispute, without searching the

records of or otherwise inquiring into the true state of the title and boundaries of the land in question."

The bill of exceptions shows that the only questions involved in this case relate to a tract of land between the top of the mountain in Huntington and in Avery's Gore on the west, and the town line of Fayston on the east, and that the alleged false representations relate to the ownership and the eastern boundary of this tract of land. In area this tract is small as compared with that of all the lands within the sale and conveyance by the defendant to the plaintiffs, according to the evidence of either party. Consequently the request includes the right and privilege of the plaintiffs to rely upon the representations made by defendant touching the location and boundaries of lands not involved in this case, and, even though sound as a general proposition of law, it was inapplicable and rightly refused. *Winn v. Rutland*, 52 Vt. 481; *Smith v. Central Vt. Ry. Co.*, 80 Vt. 208, 67 Atl. 535; *Needham v. Boston & Maine R. R.*, 82 Vt. 518, 74 Atl. 226.

Exception was taken to the failure of the court to comply with the plaintiffs' second request, reading as follows: "If the defendant, in order to induce the sale, represented that he had personal knowledge as to the location of his eastern boundary in the town of Huntington and in Avery's Gore, being at the same time aware that he had not such knowledge, his representation was fraudulent, although he did not state such boundary different than he believed it. It was an imposition and fraud for him to pass off his belief as knowledge, and if the plaintiffs relied upon his representation, they are entitled to recover for their damages arising therefrom." This request entirely omits the element of falsity in the representations made, without which being affirmatively shown there can be no recovery in this case. As before seen, the evidence was conflicting as to what the representations in fact were, and their falsity depended upon whether the jury should find them to have been according to the tendency of the plaintiffs' evidence. Counsel for plaintiffs rely upon the case of *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313, as an authority supporting their request. But in that case, "It was conceded," says the court, "that the quantity of land was represented incorrectly." Hence the element here lacking in the request, was there one of the conditions of the case. So the holding in that case does not go to the extent of saying that the element of falsity

in the representations is not essential to liability. The request was unsound in this respect, and was properly refused.

The result being that a reversal must be had on other grounds, the exceptions to the court's refusal to continue the case, and to its overruling the motion to set aside the verdict, are not considered.

Judgment reversed and cause remanded.

STATE v. WILLIAM MACK.

May Term, 1917.

Present: WATSON, C. J., HASLTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 8, 1917.

No. 201, Acts 1912—Illegally Maintaining Posters—Evidence—Admissibility—"Field"—Exceptions—When Not Explicit—Constitutional Question—When Not Considered.

In a prosecution for maintaining posters prohibiting fishing in a stream from which respondent had the exclusive right to take fish for more than one year after the waters thereof were last stocked by him, in violation of No. 201, Acts 1912, § 57, it is not necessary to show that the posters were of the size and description prescribed in the act, where the evidence tends to show that they attracted attention and were readable from a nearby highway, and that respondent had kept them up for the purpose and with the effect of keeping fishermen off the premises.

In such case, no error results from the admission in evidence of a deed to the respondent, under exception that there was no evidence that the posters were on the land described therein, there being evidence that respondent owned and occupied the premises covered by the deed, and that the posters complained of were on his home place.

The word "field," as used in this State, indicates cultivated land.

An exception not sufficiently explicit to raise the question relied upon will not be considered.

An exception to the failure of the court to charge that respondent could not be convicted, in a prosecution under No. 201, Acts 1912, § 57, because the lands in question, claimed to belong to respondent, were not enclosed or cultivated, is not sufficiently explicit to raise the question whether the evidence showed that the land "through which" the stream in question flowed was cultivated.

A constitutional question, not raised upon trial, but suggested for the first time in Supreme Court, will not be considered.

INFORMATION for maintaining posters prohibiting fishing in a stream from which respondent had the exclusive right to take fish for more than one year after the waters thereof were last stocked by him, in violation of No. 201, Acts 1912. Plea, the general issue. Trial by jury at the December Term, 1916, Windsor County, *Waterman, J.*, presiding. Verdict, guilty. Respondent excepted. The opinion states the case.

William Batchelder and Charles Batchelder for respondent.

Bert E. Cole, State's Attorney, for the State.

HASELTON, J. This is a prosecution, under the fish and game law relating to private preserves, charging that the respondent, having the exclusive right to take fish in a certain stream in Woodstock, did unlawfully, more than one year after the waters of the stream were last stocked by him with fish, maintain posters prohibiting fishing in the stream. Trial by jury was had and verdict and judgment were for the State. The respondent was sentenced to pay a fine of twenty dollars and costs for the maintenance of two posters as found by the jury.

The fish and game law provides that an owner, or a person having the exclusive right to hunt or trap upon enclosed land or cultivated land not enclosed, or to take fish in a pond or stream, who desires to protect his land or land over which he has such exclusive control, shall maintain upon the land notices or signboards, not less than two feet long and one foot wide, stating that shooting, trapping or fishing is prohibited and giving the name of such owner or person. As to waters the requirement is that the posters shall show the date on which the waters were stocked. Acts of 1912, No. 201 § 57. A later section of the act referred to, provides that a person who maintains a poster, prohibiting

fishing, for more than one year after the waters were last stocked by him shall be fined ten dollars for each poster so maintained. § 60, *id.*

The evidence on the part of the State tended to show that June 25, 1915, the respondent maintained two posters on a farm owned and occupied by him as a home place, that the posters were along the side of a brook that ran through the farm, that the posters were alike, and that the following notice was on each: "Fishing on these premises is strictly prohibited. The waters of these premises was stocked in accord with Sec. 57 of No. 201 of the Acts of 1912. W. E. Mack."

The evidence on the part of the State further tended to show that the waters in question had not been stocked within a period of much more than one year previous to the date mentioned, but that the notices had long been maintained by the respondent. There was no direct evidence as to the size of the posters, but the testimony tended to show that they attracted observation and were readable from a highway nearby, and that the respondent kept them up for the purpose and with the effect of keeping fishermen off the premises.

The respondent by an exception made the claim, which he argues here, that because the posters were not shown to be at least two feet long and one foot wide, and because there was on them no date as to stocking, the posters were not within the prohibition of the statute, although maintained more than one year after the stocking. But we hold otherwise. The posters were strictly within the letter of the prohibitive provision of the statute, and were also within its meaning. The prohibition is so framed as to avoid by reference or implication, the idea that "a poster prohibiting fishing" can be maintained indefinitely after the last stocking of the waters provided it varies somewhat from the requirements of a poster sufficient to protect a private preserve stocked within a year.

The respondent's counsel in his brief says "No statute here under consideration is violated, unless the respondent maintained to view a poster that deceived some one into the belief that the waters were stocked, and that the poster was being maintained by virtue of section 57." We take this claim of the respondent to be substantially correct, and we find ample evidence tending to show that the respondent maintained to view such posters as the respondent's brief, in the above quotation, well described.

There was undisputed testimony that the land in question belonged to the respondent. His admissions to that effect were given in evidence. A deed to the respondent was introduced in evidence, under objection and exception, the exception to be available in case there was no evidence to show that the posters were on the land described in the deed. The connecting testimony was rather vague, but the town clerk, before producing the deed, testified to the effect that it was the deed of the premises occupied by the respondent, his home premises, and the testimony tended to show that the posters were on his home place. There was no error relating to the production of the deed, certainly no prejudicial error.

The respondent requested the court to charge that to entitle the State to a verdict of guilty it must appear that the lands in question, claimed to be those of the respondent, were either enclosed by fences or other actual bounds, or were cultivated lands; that the State had shown neither fact, and that therefore the respondent was entitled to an acquittal. This binding instruction the court did not give and the respondent excepted. The testimony tended to show that two posters were in the "field" of the respondent, and that on a part of this field close to the stream in question, a little brook, a potato crop was growing at the time in question. The word "field" frequently indicates cultivated land, as appears from the dictionaries, and in this State it naturally indicates such land; for while we speak of wood land, and pasture land, we speak of a wheat field, a corn-field, a potato field, etc.

The respondent does not controvert the proposition that some of the land in question was cultivated land, but says that the testimony falls short of showing that the land "through which" the stream flowed was cultivated, meaning, we suppose, that the evidence falls short of showing that the land across the brook from the potato field was cultivated. However, his exception was not sufficiently specific to raise that question, and therefore without passing upon its materiality we dismiss it without consideration. The trial court was not in error in failing to give the instruction requested.

After verdict and before judgment the respondent moved in arrest. The motion was overruled and the respondent excepted. The grounds of the motion were either too general to be considered, or related to claimed defects which, if real, were

cured by verdict, or else they related to exceptions in the prohibitive statute that did not constitute a material part of the definition of the offence denounced. All this sufficiently appears by reference to the opening part of this opinion.

The respondent suggests here a constitutional question, but it was not raised on trial and therefore we do not consider it. Exceptions not herein noted, were taken, but they are necessarily disposed of, adversely to the respondent, by the holdings already made.

Judgment that there is no error in the proceedings and that the respondent take nothing by his exceptions. Let execution be done.

CLARENCE S. WHITTIER v. MONTPELIER ICE CO. & GEORGE W. PARMENTER.

October Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 19, 1917.

Adverse Possession—Landlord and Tenant.

The lessees of a part of a river bed cannot acquire by adverse possession the right to harvest ice over such part during the time they occupy the premises as lessees and pay the rent without complaint.

APPEAL IN CHANCERY. Heard on bill, answer and facts found by the chancellor in vacation after the September term, 1916. Washington County, *Fish*, Chancellor. Decree for the plaintiff. The defendants appealed. The opinion stated the case.

See the prior report of this case, 90 Vt. 16.

Herbert G. Barber & Fred B. Thomas for plaintiff.

F. L. Laird for defendant.

ants are content with the decree to that extent. In the circumstances of this case, we are only called upon to decide whether the plaintiff is entitled to the relief granted in that part of the decree to which the defendants object.

The finding of the chancellor, supported by the evidence in the case that the defendants, one or both of them, had held the disputed portion of the river bed as lessee, during the time in which the defendants claim to have acquired by adverse possession the right to harvest ice over the disputed portion of the river bed defeats such claim and it is so well settled everywhere that a lessee cannot acquire by adverse possession such right during the time he occupies the premises as lessee and pays the rent without complaint, that a citation of authorities is unnecessary.

Decree affirmed and cause remanded.

DANIEL MINER'S EXECUTRIX v. SARAH SHANASY AND OTHERS.

May Term, 1917.

Present: WATSON, C. J., HASLTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed December 13, 1917.

Chancery—Jurisdiction—Transfer of Suits—Dismissal.

A court of chancery has no jurisdiction to transfer to itself a suit at law over which the county court had acquired competent and complete jurisdiction at the time of bringing the bill.

A court will dismiss a cause at any stage, whether moved by the party or not, when it is discovered that it has no jurisdiction, and an objection to the jurisdiction is never out of time.

APPEAL IN CHANCERY. Heard on bill, answer and facts found in vacation after the June Term, 1916, Caledonia County, Slack, Chancellor. Decree for defendants. Plaintiff appealed. The opinion states the case.

H. P. Dee and M. H. Alexander for plaintiff.

W. H. Fairchild for defendant, H. S. Soule, Administrator.
No appearance for the other defendants.

MILES, J. This is a bill in chancery the object of which is to transfer a suit at law from the Franklin County court to the court of chancery, that the plaintiff may interpose the equitable defence of laches with the defence of the statute of limitations, and to obtain an injunction against the defendants, Sarah, Fred and Elizabeth Shanasy, and for the appointment of a receiver.

A temporary injunction was granted by the chancellor at the time the original bill was filed against all the defendants, restraining the further prosecution of the suit at law until further order of court.

The defendant, Sarah Shanasy, answered, admitting the facts alleged in the bill and the defendant, Harry S. Soule, answered, denying some of the allegations of the bill and admitting others, and no answer was made by the other defendants.

Afterwards the cause came on for hearing before the chancellor and a full hearing was had by him respecting the matters embraced in the suit at law. Facts were found and a decree thereupon rendered. Among other things it was decreed that said lease was a valid, subsisting and continuing obligation against the estate of Daniel Miner and that there was due and owing from his estate the sum of \$963.37, and that there would become due annually thereafter the sum of \$210 on the first day of November in each year "as long as wood grows and water runs," or until the estate of said Miner shall have paid or caused to be paid to the estate of Samuel H. Soule the sum of \$3,500, in excess of any accrued rent. From this decree the plaintiff appealed to this Court. The defendant, Soule, in his answer, objected that said suit at law could not be transferred to the court of chancery, the county court having acquired competent and complete jurisdiction of that matter at the time the bill was brought. It is stated in 7 R. C. L. 1067, par. 105, as follows:

"It is a familiar principle that when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority continues subject only to the appellate authority, until the matter is finally and completely disposed of, and no court of coordinate authority is at liberty to interfere with its action." To the same effect is *Whittier v. McFarland*, 79 Vt. 365, 65 Atl. 81.

The chancellor should have dismissed the bill as soon as it came to his attention that the court of chancery had no jurisdiction of the cause; *International Paper Co. v. Bellows Falls Canal Co.*, 91 Vt. 350, 100 Atl. 684; *Holt v. Daniels*, 61 Vt. 89, 17 Atl. 786; *Lumber Co. v. Lyman*, 89 Vt. 201, 94 Atl. 837. It has been a rule of law in this State from the time this Court decided *Chittenden v. Hurlburt*, 1 D. Chip. 384, to the present time, that a court will dismiss a cause at any stage, whether moved by a party or not, when it is discovered that it has no jurisdiction, and an objection to the jurisdiction over the subject matter is never out of time. Nor can consent confer jurisdiction where it is not given by law; *Glidden v. Elkins*, 2 Tyl. 218; *Thayer v. Montgomery*, 26 Vt. 491; *Miller v. Potter*, 54 Vt. 267; *Sanders v. Pierce*, 68 Vt. 468, 35 Atl. 377.

It is not now necessary to decide whether in case of a perpetual lease reserving rent, the lessor's administrator can, in any event, recover for rent accruing after the lessor's death. See *Executors of Van Rennselaer v. Platner*, 2 Johns. Cas. (N. Y.) 17; *Van Rennselaer's Devisees v. Platner*, 2 Johns. Cas. (N. Y.) 26; *Van Rennselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278; *Van Rennselaer v. Read*, 26 N. Y. 558, and *Bank v. Haydorn*, 48 N. Y. 260.

Decree reversed and cause remanded.

VERMONT FRUIT COMPANY v. O. H. WILSON AND TRUSTEE.
FARMERS' UNION BANK, CLAIMANT.

November Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed January 4, 1918.

Evidence—Admissibility—Process—Ministerial and Judicial Acts—Trustee Process—Claimant—Depositions—By Whom Taken—Formal Requisites—Presumptions—Objections.

In a hearing to determine the sum due from a bank, summoned as trustee in an action of contract, to the principal defendant, it was proper for the claimant to show by the treasurer of the bank that

a draft drawn on the plaintiff was received by it from the claimant, and that, before it had time to remit the funds, the trustee process was served upon it; and the fact that the witness said on cross-examination that his testimony was his recollection from data taken from the records of the bank did not render it inadmissible.

The signing of a writ of attachment, a summons or a citation is a ministerial act, and may be done by the attorney for the party at whose instance the process is issued.

When an act is in a matter calling for the exercise of judgment and discretion, the act is judicial; but when the exercise of judgment and discretion is not required, the act is ministerial.

The claimant of funds in the possession of a bank summoned as trustee in an action of contract is so far a party to the suit as to enable him, before being admitted as a party claimant, to take a deposition in support of his claim in the manner prescribed by statute, notice having been duly served upon the plaintiff in the suit.

Where it is clear that no injustice will result in the admission of a deposition in evidence, departure from the strict letter of the statute in minor and formal matters may be disregarded.

If a deposition purports to have been taken by competent authority, the official character assumed and the authority of the person who acted will be presumed until the contrary appears; and so, when a magistrate who took a deposition designated himself as "Clerk and Master of Chancery Court of Lauderdale County, Tennessee," it will be presumed, nothing to the contrary appearing, that the two capacities combined were necessary to give the authority to take the deposition.

Where the cause assigned in the citation for taking a deposition is according to the fact, and is a legal cause, the objection that the real cause is not stated is not well founded.

Whitney v. Sears, 16 Vt. 587, and *Clark's Admr. v. Wilmington Savings Bank*, 89 Vt. 6, distinguished.

ASSUMPSIT. Heard on the report of a commission upon the question of the right of the claimant to the funds in the hands of the trustee at the September Term, 1916, Chittenden County, *Waterman J.*, presiding. Judgment for the claimant. Plaintiff excepted. The opinion states the facts.

John J. Enright and *V. A. Bullard* for plaintiff.

Max L. Powell for claimant.

MILES, J. This is an action of contract, commenced by trustee process, in which the Farmers' Union Bank is claimant, and the controversy arises between the plaintiff and the claimant over the fund trusteed. The case was referred to a commissioner upon whose report and finding of facts the judgment below was rendered for the claimant. Exceptions to this judgment and to rulings of the court on trial were taken by the plaintiff; but only two of those exceptions have been briefed and we confine our consideration to the exceptions briefed.

From the commissioner's report and the files and records of the court in this case, referred to and made a part of the commissioner's report, it appears that on May 23, 1916, the principal defendant made a draft for \$720 upon the plaintiff, payable to the claimant and guaranteed by the Howard National Bank of Burlington, Vermont, and on that day delivered the same to the claimant for cash with which to pay for a carload of berries; that afterwards the draft was sent through the regular correspondents of the claimant to the Chittenden County Trust Company of Burlington, Vermont, the trustee in this suit, for collection; that upon receipt of the draft the trustee made demand of payment, and the same was paid on the first day of June, 1916, and on the same day this suit was brought by the plaintiff against the defendant Wilson, and the money paid on the draft was then trusteed. On the 10th day of June, 1916, Max L. Powell, a Master in Chancery and an attorney for the claimant, issued a citation notifying the plaintiff of the taking of the deposition of Vernon Peters, before A. O. Durham, Clerk and Master of Chancery Court, Lauderdale County, Ripley, Tennessee, on the 24th day of June, 1916, in which the plaintiff, defendant and claimant were described as parties to the suit, and service of the citation was made upon the plaintiff on the 12th day of June, 1916, and this suit was entered and docketed on the day last named. On the 24th day of June the deposition was taken according to notice without appearance on the part of the defendant. On July 13, 1916, the claimant filed in court his application to be admitted as a claimant in this suit and also filed a statement of his claim, and on August 16, 1916, the claimant filed a bond in the suit and on the 28th day of August he opened and filed the deposition of Peters, in court, and at the September term of the Chittenden County court, to which this suit was made returnable, the claim-

ant was admitted by that court to enter as a party claimant in this suit.

The first exception insisted upon in plaintiff's brief was to the admission of questions to the witness, Worthen, Treasurer of the Chittenden County Trust Company, as follows: "Did a draft come through the First National Bank of Concord, New Hampshire, from the Farmers' Union Bank of Ripley, Tennessee, for \$720, on May 31, or June 1, 1916, drawn on the plaintiff?" To this question the witness replied in substance, that his bank received a draft from some bank the name of which he did not remember, through the First National Bank of Concord, New Hampshire, drawn upon the plaintiff, which was paid in due time after the notice had been given the plaintiff. The course the draft had traveled appeared substantially in the endorsement on the back of the draft which was received in evidence without objection. The witness was further asked: "Before your bank had time to remit those funds what occurred?" The witness in substance answered that the bank was trustee and that the funds were still in its possession. The officer's return on the writ shows that the bank was trustee. Both questions were objected to by the plaintiff as incompetent and immaterial and answers were received subject to exception. On cross-examination the witness was asked, "Is what you have testified to from your own personal recollection?" To this question the witness answered: "It is my recollection from data taken from the records of the bank." Thereupon the plaintiff moved to strike out all of the witness' testimony as it was not the best evidence and, upon the court's refusal to grant the motion, the plaintiff took an exception. None of the bank's records were in court and it does not appear that the plaintiff called for them; nor does it appear to what record the witness referred from which he refreshed his recollection. The testimony of the witness was as to matters of his own personal recollection refreshed by the bank's records as his answers show. And, though a record may have been made of the facts stated in the answer, first objected to, the answer was nevertheless admissible, there being no rule of law making that record, whatever it may have been, the exclusive proof by which that fact could be established. The answer to the second question objected to simply identified the bank as the bank trustee which still held the funds in controversy between the claimant and the plaintiff, and the evidence, therefore, was

competent. The evidence was also material as one step in line with the claimant's evidence showing that the funds trusted were the claimant's. What we have said in this connection disposes of the motion to strike from the record Worthen's testimony.

The grounds of the plaintiff's exception to the admission of the deposition, are several, and we take them up in the order taken in the plaintiff's brief.

The first ground of the objection is, that the citation was signed by the claimant's attorney. In support of this ground the plaintiff relies upon *St. Johnsbury v. Goodenough*, 44 Vt. 662; *Thomas v. Graves*, 90 Vt. 312, 98 Atl. 508, and argues that the reason underlying those cases applies in this case. Both of these cases relate to the appointment of a person to serve process. The appointment in those cases was an attempt to confer upon the person so appointed an authority not otherwise given to him by law. It can well be argued from such cases that to allow an interested party to make such appointments would enable him to select a wholly irresponsible person, mentally and morally deficient, to serve a process in which great interests might be involved. In the *St. Johnsbury* case the Court states the reason why an interested person should not have the power to appoint a person to serve process, in the following language: "To justify the authorization of a person to serve a precept, there are two subjects upon which the justice must exercise his discretion and judgment;—first, if the precept will fail of service unless such authorization is made, and second, upon the person whom he will authorize."

The signing of a citation or writ of summons, however, is not subject to such objection; for the signing of either requires no exercise of discretion or judgment and is designed simply to bring a party into court or before the magistrate taking the deposition, and the writ is returnable before a person appointed by law. The signing of a writ, a summons or citation is merely a ministerial act. *Fairbanks & Co. v. Kittredge et al.*, 24 Vt. 9; *School District v. Kittredge et al.*, 27 Vt. 650; *Henry v. Edson*, 2 Vt. 499.

The foregoing cases are in reference to the judicial and ministerial acts of listers and the holding in those cases in substance is, that when the act is in a matter calling for the exercise of judgment and discretion the act is judicial, and that when the

act is in relation to matters in which the exercise of judgment and discretion is not required, the act is ministerial. In *Sinclair v. Gadcomb*, 1 Vt. 32, where a writ, returnable to the County court of Chittenden County, was signed by a councillor as "Justice of the Peace for the whole State," it was contended on the part of the defendant that there was no such officer, for a judge of the Supreme Court as well as the councillor was a justice *ex-officio* for the whole state, and that, if the councillor who was a resident of Franklin County, could sign a writ returnable to the Chittenden County court the same could be done by a judge of the Supreme Court and therefore it should appear from the face of the writ whether the person signing it claimed to be a judge or a councillor, that the opposite party might have an opportunity to traverse the fact. It was further objected that being a resident of Franklin County he could not in any event sign a county court writ returnable to the Chittenden County court. Judgment was rendered for the plaintiff and the case was brought to this Court on a writ of error. The judgment was affirmed and Royce, J., delivering the opinion said; "When the authority of councillors to sign these writs, as justices of the counties where the writs issued, was thus established, it came to be generally understood, that such writs by them signed were not limited by the local jurisdiction of the county courts to which they were made returnable, but might run to the extent of their own jurisdiction as justices of the peace. Whether this conclusion was correct or not, it is settled by practice too long and uniform to be now disturbed. And there is less occasion to do this, since it is a matter of indifference how the law on this point is. No evil can result from the power thus exercised by these magistrates; it is the performance of an act almost wholly ministerial, and is but the incipient step in pursuit of justice."

When the judge, delivering the opinion, used the expression, "almost ministerial," he could not, by the use of the word, "almost," have intended that the act was judicial; for what he says in connection therewith excludes such a conclusion, and later, in *Graham v. Todd*, 9 Vt. 166, and *Ins. Co. v. Cummings*, 11 Vt. 503, in which he sat as a member of the Court, it was held that an interested party may sign a writ of attachment and take a recognizance. That the signing of a writ of attachment, summons or citation is a ministerial act cannot be doubted when considered in connection with *State v. Howard*, 83 Vt. 6, 74 Atl.

392 and the cases therein referred to. See also note to *Mayor v. Morgan*, 7 Mart. (La.) N. S. 1, 18 Am. Dec. 232.

The person signing the citation, unlike the appointment of a person to serve process, appoints no one, but simply selects from among the persons appointed by law to perform those public duties, and nothing is lost or gained by such issue of process. It has been a practice as long as courts have been held in this State for justices of the peace to sign blank writs for attorneys to use whenever desired and a similar practice has obtained among county clerks throughout the State, without any injury resulting therefrom or serious thought that injury to anyone would result in consequence thereof, although every lawyer understood that it was in effect permitting the attorney to issue process, and to select from among magistrates those whom the attorney preferred to act for him. In line with the foregoing views this Court has held, as above stated, that an interested party may sign a writ of attachment and take a recognizance. *Graham v. Todd, supra; Ins. Co. v. Cummings, supra.*

No reason appears to us for holding that an interested person may sign a writ of attachment and take a recognizance but cannot sign a citation. In *Clement v. Brooks*, 13 N. H. 92, it is held that notice to a party, signed by the plaintiff, a justice of the peace, was sufficient. It is said in 13 Cyc. 904, par. 7, that irregularity in signing the notice for taking a deposition is immaterial, if the party notified was not misled or prejudiced. Upon principle as well as upon authority we think the citation was lawfully issued and that there was no error committed by the court upon that point.

The second ground of the second exception is, that the claimant was not a party to the suit at the time the citation was served and the deposition taken, and the plaintiff relies in support of this exception upon *Whitney v. Sears*, 16 Vt. 587. In that case the deposition was taken at the request of one who had no connection with any issue joined in the case, so far as the facts disclose, and how he came to issue the citation and take the deposition does not appear. So far as anything appears in the case he was a stranger to the suit. Most certainly a deposition taken under such circumstances would not be admissible; but that is not this case. Here the whole controversy and issue tried was between the plaintiff and the claimant, the principal defendant and trustee taking no part in the trial, and the find-

ing of the commissioner relates to no issue between other parties. The plaintiff was adverse to no one but the claimant, on that trial, and though the claimant had been admitted as a party at the time of the trial, he was no more a party in interest at that time than when he took the deposition. The only difference before and after his admission, was, that after being admitted he was a party of record while before he was only a party in interest. The rights of the plaintiff were as secure with the deposition taken as it was, as they would have been if taken after the claimant had been admitted as a party. The plaintiff knew that the claimant was such when the citation was served upon him, for he was described as such in the citation. If the claimant had never been admitted as a party, but had appeared and asserted his claim in court without objection, he would have been so far a party to the suit as to have been bound by the result of the trial; *Towne v. Leach*, 32 Vt. 747; *Carr v. Sevene*, 47 Vt. 574. The plaintiff had as ample opportunity to be present and cross-examine as he would have had if the claimant had been admitted before the deposition had been taken. This Court seems to have taken the view that an opportunity to cross-examine the deponent is to be considered by the court as a strong factor in determining the admissibility of the deposition, in the case of *Johnson v. Sargent*, 42 Vt. 195. In that case, where the deposition was taken of a witness about to leave the State, and who was present at the term to which the deposition was made returnable, but the case was continued at that term, it was held, that the deposition was admissible at a subsequent term, the witness then being absent from the State, and in that connection the Court said:

"The opposite party had the same opportunity to be present and cross-examine the deponent on the first taking that he would have upon the second, so that no benefit would be derived by any one by putting such a construction upon the statute as would compel the party, under such circumstances as existed in this case, to retake the deposition."

The same might well be said in the case before us. The objection on this ground is technical, and we might say in relation to it as was said in *Stephens v. Joyal*, 45 Vt. 325:

"And since by statute the use of *ex parte* depositions is excluded, the court feel no inclination to extend the criticism of technical forms, for the purpose of excluding testimony taken on fair notice to the adverse party."

The manner in which the deposition was taken in the case at bar, was in accord with the statute. No injustice can be done the plaintiff in holding that the claimant was so far a party to the suit at the time the deposition was taken as to enable it to take it as it was taken. This case is clearly distinguishable from the case of *Whitney v. Sears*, 16 Vt. 587. That case turned upon the fact that the party against whom the deposition was taken was not adverse to the party at whose request the deposition was taken, or, at least, it did not so appear in that case; while in this case there is no question about who was the adverse party.

The plaintiff cites *Clark's Admr. v. Wilmington Savings Bank*, 89 Vt. 6, 93 Atl. 265, in support of its contention upon this ground of objection. No question can be raised as to the soundness of the law laid down in that case; but it is not in point in this case. In this case the statute was strictly followed in all particulars, so far as anything is called to our attention. The tendency of the courts at the present time is to disregard even departures from the strict letter of the statute in minor and formal matters, where it is clear no injustice will result to anyone in admitting the deposition; 8 R. C. L., 1162, par. 33, 1164, par. 36. In this case it is clear that no injustice resulted to the plaintiff in admitting the deposition. The plaintiff knew when the draft was paid and taken up, that it was made payable to the claimant. In the circumstances of the case the plaintiff must have known that the Farmers' Union Bank had sent the draft to the trustee for collection, for he had notice of that fact, and he must have known the claimant would appear and claim the money paid on the draft, at the time the citation was served upon him, and we think this ground of exception to the admission of the deposition was not well taken.

The third exception is to the capacity in which the magistrate took the deposition. This exception admits of very little discussion. If a deposition purports to have been taken by competent authority, the official character assumed, and the authority of the person who acted, will be presumed until the contrary appears; 13 Cyc. 848; *Barron v. Peters*, 18 Vt. 385; *Cram v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142.

The magistrate who took the deposition designated himself and his authority, "Clerk and Master of Chancery Court of Lauderdale County at Ripley, Tennessee." The plaintiff argues that this is a designation of two authorities by either of which

he was authorized to take the deposition, but that the magistrate could not take it in two capacities. We do not think that the authority in which he acted shows that he acted in a double capacity. There is nothing before us indicating that the magistrate could have taken the deposition as clerk or master alone, and we are to presume that the two combined were necessary to give him authority to take the deposition.

The plaintiff's fourth ground of objection to the deposition is, that the real cause for taking it is not stated. This objection is not well founded for the cause stated was according to the fact and was a legal cause for taking the deposition. This exception to the admission of the deposition was without merit.

Judgment affirmed.

STATE v. ADALGISA VILLA.

November Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed January 11, 1918.

Criminal Law—Pleading—Sufficiency of Information.

The language of Chap. 1, Art. 10 of the Vermont Constitution, that "in all prosecutions for criminal offences, a person hath a right to demand the cause and nature of his accusation" does not mean that it is necessary for the accused to make actual demand for the information, but only that he is entitled to be informed of the nature of the charge brought against him.

The description of the offence charged against an accused must be found in the complaint or other form of accusation, unaided by extrinsic facts; and a legally inadequate complaint cannot be made sufficient by a specification or bill of particulars.

A criminal complaint sufficiently states the nature of the offence charged when it sets it forth with such particularity as will reasonably indicate the exact offence, and will enable the accused to make intelligent preparation for the defence, and if the trial goes against

him, to plead his conviction in a subsequent prosecution for the same offence.

A complaint charging that respondent did "sell intoxicating liquor without authority" is bad on motion in arrest of judgment, under the provisions of Chap. 1, Art. 10 of the Vermont Constitution, as well as under common law, because it may apply to one of several definite offences without specifying which, and therefore does not sufficiently inform the accused of the particular offence charged.

The legislature cannot legalize a form of criminal complaint which fails to meet the requirements of Chap. 1, Art. 10 of the Vermont Constitution.

COMPLAINT, charging that the respondent did "sell intoxicating liquor without authority." Plea not guilty. Trial by jury in the city court of the city of Barre, *H. William Scott*, Judge. Verdict guilty. After verdict and before sentence the respondent moved in arrest of judgment for that the complaint was uncertain, insufficient and indefinite and did not legally inform her of the causes and nature of the accusation against her. Motion overruled. Respondent excepted. The opinion states the case.

Richard A. Hoar for respondent.

Earle R. Davis, State's Attorney, for the State.

POWERS, J. This respondent was tried in the city court of Barre for illegal liquor selling. The jury returned a verdict of guilty, and she moved in arrest on the ground that the complaint was too uncertain to support a judgment. The motion was overruled and an exception saved.

The complaint charges that the respondent at a time and place named, did "sell intoxicating liquor without authority," contrary to the statute and against the peace—without further particulars or description.

It is provided in Chap. 1, Art. 10, of the Constitution of our State that "in all prosecutions for criminal offences, a person hath a right to demand the cause and nature of his accusation."

From this form of expression it is not to be inferred that it is necessary for the accused to make any actual demand for this

information, for it means no more than corresponding clauses found in the constitutions of some of the states to the effect that the accused is entitled to be informed of the nature of the charge brought against him. Such information must be found in the complaint or other form of accusation to which he is called upon to plead, unaided by extrinsic facts. If this be legally inadequate, it cannot be made sufficient by a specification or bill of particulars, even. *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 700, 1 Ann. Cas. 495; *Com. v. B. & O. R. Co.*, 223 Pa. 23, 72 Atl. 278, 132 A. S. R. 723; *U. S. v. Cruickshank*, 92 U. S. 542, 23 L. ed. 588. Reasonable certainty in the statement of the crime suffices. All that is required is that the charge be set forth with such particularity as will reasonably indicate the exact offence the accused is charged with, and will enable him to make intelligent preparation for his defence, and if the trial goes against him, to plead his conviction in a subsequent prosecution for the same offence. *State v. Webber*, 78 Vt. 463, 62 Atl. 1018. A complaint which may apply to one of several definite offences without specifying which, was fatally defective at common law. 1 Whart. Cr. L., Par. 294; *State v. Shadroi*, 89 Vt. 520, 96 Atl. 8. It is equally defective under this constitutional requirement. The complaint before us breaks down when tested by this rule. There are several different ways in which one can be guilty of selling intoxicants illegally, each of which amounts to a distinct statutory offence, requiring different evidence to sustain or defend it. For instance, P. S. 5140 makes it a crime to sell intoxicating liquors at wholesale without a license therefor. Section 5141 makes it a crime for a licensee of the fourth class to sell unapproved or adulterated liquors. Section 5204 makes selling intoxicants without a license a crime; and the same section forbids selling by a licensee while his license is suspended or forfeited. Section 5208 makes it criminal for a licensee to sell on credit or by way of barter. Section 5209 makes it a crime for a licensee of the fifth class to sell liquor to be drunk on the premises, while 5215 covers all sales in violation of the statute not otherwise provided for. These offences are separate and distinct, each carrying its own penalty, differing materially from the others or some of them. In these circumstances it cannot be said that the respondent is sufficiently informed of the particular offence with which she stands charged.

The State insists that this complaint is sufficient because it is drawn in accordance with a form prescribed by statute. But this argument will not avail. The complaint is so defective that it fails to meet the requirements of the Constitution and therefore the attempt of the Legislature to legalize it necessarily goes for nothing. *State v. Webber, supra*. The decisions of this Court upholding this form of complaint are not applicable in view of present statutory provisions.

The danger of using this statutory form in these cases was brought to our attention in *State v. Monte*, 90 Vt. 566, 99 Atl. 264, and while the point was made too late to be availing in that case, we took occasion to close the opinion with a broad hint of what the result of such use might be.

The defect is fundamental, it appears on the face of the record, and the motion must be sustained.

The judgment overruling the motion is reversed, the motion is sustained, judgment is arrested, and the respondent is discharged.

MAX L. POWELL v. JAMES A. MERRILL.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, and TAYLOR, JJ.

Opinion filed February 12, 1918.

Landlord and Tenant—Eviction—Suspension of Obligation to Pay Rent—Forfeiture—Breach of Covenant—Re-entry—Ouster of Tenant—Intent of Landlord—Rights of Tenant—Trial—Improper Remarks of Counsel—Motion for Reargument—Findings of Fact—Conclusiveness—Facts Not in Record—Grounds for Reargument Not Specified in Motion.

An eviction by act of the landlord, in order to have the effect of suspending the obligation of the tenant to pay rent, must result from a wrongful act of the landlord.

The mere breach of a covenant contained in a lease does not, in the absence of a special stipulation, work a forfeiture of the term or give the landlord a right of re-entry; forfeiture not being favored by the law and stipulation therefor being strictly construed.

When the findings of fact do not show a breach of the conditions in a lease, the landlord cannot justify his re-entry upon the premises upon a provision in the lease giving him the right to re-enter for that reason.

Where the acts of a landlord necessarily result in depriving the tenant of the beneficial enjoyment of the premises or a substantial part of them, the intent to oust the tenant will be conclusively presumed, because the landlord will be presumed to intend the natural consequence of his acts.

An eviction of a tenant by the landlord from a part of the leased premises suspends the obligation to pay rent in its entirety.

Where a tenant has been actually evicted by the landlord, no demand by him for restoration to the premises is necessary to protect his rights.

Where a suit has been brought by a landlord against his tenant to recover for rent in arrears, and defendant deprived of possession by the attachment made, a promise of the tenant to pay the amount due and an endeavor to induce the landlord to release him from further liability does not amount to a waiver of the tenant's right to claim an eviction by the landlord in defense to another suit brought to recover rent which accrued subsequent to the commencement of the first suit.

The fact that a tenant has received and retained rent from a sub-lessee of part of the leased premises does not affect his right to claim a partial eviction from the premises in defence to an action by the landlord against him to recover unpaid rent.

Improper remarks made by counsel during the cross-examination of a party will not cause a reversal where prejudice is not made to appear; and where the trial was by the court it will be assumed that no harm resulted.

On a motion for reargument, the Supreme Court is bound by the findings of fact filed below pursuant to G. S. 2259, and cannot supplement them by examining the transcript or exhibits for missing facts; and such findings are not enlarged by a reference to the transcript and exhibits contained in the bill of exceptions.

The Supreme Court cannot, to reverse a judgment, supply facts not shown by the record.

An alleged mistake made by the Supreme Court in rendering a decision, not specified in a motion for reargument, is waived.

GENERAL ASSUMPSIT to recover rent claimed to be due under a written lease, for the period between November 1, 1913 and March 1, 1914. Trial by court at the September Term, 1915, Chittenden County, *Miles, J.*, presiding. Judgment for plaintiff to recover rent from November 1, 1913 to November 15, 1913. Plaintiff excepted. The opinion states the case.

Max L. Powell for plaintiff.

V. A. Bullard and *Sherman R. Moulton* for defendant.

POWERS, J. The plaintiff by a writing under seal, rented to the defendant a building in Burlington. The lease provided for a monthly rent, authorized the lessee to sublet with the lessor's consent, required the tenant to pay the water rates, and stipulated for a right of re-entry for a breach of its covenants.

At some time during the term, the defendant, with the plaintiff's permission, sublet a part of the premises to the American Woolen Company, who occupied such part, undisturbed by the plaintiff, until December 1, 1913, when they paid to the defendant the October and November rent and vacated the premises. The defendant continued to occupy that part of the premises not so sublet until November 15, 1913, on which day the plaintiff brought a suit against him, seeking to recover therein rent in arrear under the lease and certain other items of indebtedness. He placed the writ in the hands of an officer for service, and by his direction the latter went to the premises and attached certain personal property of the defendant there found, and having ejected therefrom one Joseph Agel, who was in the part occupied by the defendant by the latter's permission, placed a padlock on the door and locked the defendant out. He did not interfere with the part occupied by the Woolen Company. Since that time, the defendant has not been in possession of any part of the premises, or had anything to do with them, except to receive the rent as above stated. One half of the rent so received, he turned over to the plaintiff. What became of the suit referred to, we do not know. Whether or not it ever came to trial, and if so, who finally prevailed, is not shown by this record.

The suit before us is an action for rent on the premises from November 1, 1913, to March 1, 1914, on which day the plaintiff gave the defendant a written release from further liability. The defendant filed several pleas, but the transcript shows that the case was tried below without regard to them. Judgment was rendered for the plaintiff to recover rent from November 1 to November 15, 1913, only, and the plaintiff excepted.

The defendant contends that the acts of the officer, done by direction of the plaintiff, amounted to an eviction of him from a substantial part of the premises, and that as a result, his obligation to pay rent was entirely suspended. But an eviction may be rightful or wrongful. 1 R. & L. Dict. 467. The term is commonly used in the books as denoting a wrongful ouster of the tenant by the landlord, and is so used in this opinion. It is established beyond controversy that an eviction by act of the landlord, in order to have the effect contended for by the defendant, must result from a wrongful act of the landlord. "Eviction, properly so called," says Mr. Justice Crowder in the much-cited case of *Upton v. Townsend*, 84 E. C. L. 70, "is a wrongful act of the landlord, which operates the expulsion or amotion of the tenant from the land." The rule invoked by the defendant is thus stated by Lord Hale in *Hodkins v. Robson*, 1 Ventr. 276; "If the lessor enters into part by wrong, this shall suspend the whole rent; for in such case, he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." To the same effect are the American authorities. *Shumway v. Collins*, 6 Gray (Mass.) 232; *Mirick v. Hoppin*, 118 Mass. 582; *Skelley v. Shute*, 132 Mass. 367; *Galleher v. O'Grady*, (N. H.) 100 Atl. 549. So unless the acts of the landlord are wrongful, although they permanently deprive the tenant of the use of the demised premises, no eviction is committed (note to 38 A. S. R. at p. 487); and a rightful re-entry does not evict. *Wright v. Everett*, 87 Ia. 697, 55 N. W. 4. So the first question for determination is, was this plaintiffs' re-entry—for that is what it amounted to—rightful or wrongful?

The common law rules regulating the rights of landlord and tenant are highly technical and strictly adhered to. Forfeitures are not favored by the law and stipulations therefor are construed strictly. The mere breach of a covenant contained in the lease does not, in the absence of special stipulation, work a forfeiture of the term or give the landlord a right of re-entry.

But the lease before us contains a provision that if the lessee should "at any time for the space of one month refuse or neglect to fulfil the conditions of this lease, then the said Powell shall have the right to enter into and upon the premises to take possession thereof and order out the said Merrill." The plaintiff invokes this clause and insists upon three grounds as justifying his re-entry thereunder: Default in payment of rent; subletting to Agel without consent; and non-payment of water rates.

As we have seen, without the clause referred to, the plaintiff had no right to re-enter. Under the clause his rights are *stricti juris*, and no more than the covenant gives him. Unless one or more of the covenants were at that time broken, and, in view of term of grace specified, had remained broken for one month, no right of re-entry existed on November 15, 1913.

The findings do not directly show that there was any rent then overdue. The nearest that they come to it is that (as we shall see) at some time or other the defendant agreed or offered to pay what rent was due. The findings also fail to show that any part of the premises were sublet to Agel. They show he was there by permission of the defendant, but nothing more. Nor do the findings show that these defaults, if such they were, or either of them had existed for one month before that date. It is found that the defendant failed to pay certain water rates, but whether this failure was a month before the re-entry is not shown. So the plaintiff fails to show by the record that his right to enter and oust the defendant had accrued when he sent the officer to the premises with the writ.

The plaintiff insists that he only intended to make an attachment and not evict the defendant when he sent the officer there, and he complains because he was not allowed to show this. It is true that in speaking of this kind of an eviction it is frequently said that the character of the landlord's act depends on his intention. And so it does; but the landlord will be presumed to intend the natural consequences of his acts (16 R. C. L. 688), and where, as here, his acts necessarily result in depriving the tenant of the beneficial enjoyment of the premises or a substantial part of them, the intent to oust the tenant will be conclusively presumed. *Id*; *Skelly v. Shute*, 132 Mass. 367; *Tallman v. Murphy*, 120 N. Y. S. 345, 24 N. E. 716.

The rule contended for by the defendant that an eviction from a part of the premises suspends the rent in its entirety, is

established by the great weight of authority not only in England but in this country. *Mirick v. Hoppin*, 118 Mass. 582; *Fifth Ave. Bldg. Co. v. Kernocsan*, (N. Y.) 117 N. E. 579; *Kuschinsky v. Flanagan*, 170 Mich. 245, 136 N. W. 362, 41 L. R. A. (N. S.) 430, and note, *Ann. Cas.* 1814 A, 1228.

At the special request of the plaintiff the court found that after the first suit was brought and when the parties were trying to adjust their differences, the defendant promised to pay the rent then due, acknowledged his liability, and endeavored to induce the plaintiff to release him from further liability under the lease by offering to turn over to him all the personal property on the premises.

It is to be borne in mind that his finding relates to the first suit and not to this one. Whatever effect those facts might have had on that suit, they cannot affect the result here. At most, they only show that there was some rent due at the time this peace parley was held. But it does not appear when that was. The facts fall short of showing that such rent was overdue one month when that action was brought. So it is not made to appear by this that the re-entry was lawful.

It is of no consequence whatever that the defendant did not demand restoration to the possession. He had been actually ousted, and no demand was necessary to protect his rights. 16 R. C. L. 685; *Lester v. Griffin*, 57 Misc. Rep. 628, 108 N. Y. Supp. 580.

Nor was there anything in the attempt to reach a settlement, above referred to, that amounted to a waiver of the defendant's rights. The attempt failed, and the parties were left right where they were before, so far as this question is concerned.

The fact that the defendant has received and still retains the November rent of the Woolen Company does not affect his rights in this case. The only thing here sued for is rent under the lease.

The plaintiff was a witness, in his own behalf, and, while he was under cross-examination, the defendant's counsel asked questions and made remarks seriously reflecting upon his character for truth telling. These were promptly held to be improper and exceptions were allowed to the plaintiff. We agree that this conduct was improper, but we cannot say that it ought to reverse the case. It must be remembered that the trial was by the court, and we would assume in such cases that no harm

resulted. Moreover the transcript is before us, and from this it satisfactorily appears that no prejudice did in fact result to this plaintiff. In saying this much we do not overlook the fact that prejudice must now be made to appear. We cannot reverse a judgment for the sake of punishing a lawyer in the case.

Affirmed.

ON MOTION FOR REARGUMENT

POWERS, J. The foregoing affirmance was announced at the February Term. During that term, and before the certificate had gone down, the plaintiff filed a motion for reargument, and, agreeably to our practice, the entry was withheld, and briefs have now been filed and considered. The motion is predicated upon the sole ground that we were wrong in our assertion that the findings do not show that the defendant was one month in default when the plaintiff took possession. And it is asserted with much confidence that this fact clearly appears from the transcript and exhibits. Perhaps so. The trouble is that it does not appear in the findings. The plaintiff overlooks the fact that we are bound by the findings filed below pursuant to the statute, and cannot supplement them by scanning the transcript or exhibits. It is suggested that the findings are enlarged by the reference to the transcript and exhibits contained in the bill of exceptions. The answer is that this cannot be done. The case was one triable by jury; the trial below was by the court. Therefore, the case is controlled by G. L. 2259 (P. S. 1982), wherein it is expressly provided that in such a case the findings shall be signed by a majority of the court and filed with the clerk. And it is therein expressly forbidden to allow any other or different facts in the bill of exceptions, except such as relate to the admission and rejection of evidence; and we are required to dismiss, on motion, any bill filed to the contrary. This statute precludes an examination of the transcript or exhibits for missing facts. *Singer Mfg. Co. v. Nash*, 70 Vt. 434, 41 Atl. 429.

The plaintiff insists that there was a concession made below that there was \$220 of rent due on November 15, 1913; and that, inasmuch as this is exactly the amount of two months' rent, it sufficiently shows that one installment was then one month overdue. No such concession was made. If it was permissible to

look into the transcript, it would only show that at the time this case was tried in the county court, it was conceded that there was due the plaintiff from the defendant the sum above named as damages in another suit then pending in that court between the parties. But it would not appear what that sum represented—whether rent in arrear or something else—or what that suit was for, or how it was related to this one. Assuming, as now claimed, that that suit was the attachment suit under which re-entry was made, all we know about it from the record is that it was brought to recover rent under the lease in question and “for other matters shown by the specification in that case.” Exceptions, p. 2. We cannot speculate about what the fact was, nor can we to reverse the judgment, supply facts not shown by the record. *First Nat. Bank v. Bertoli*, 88 Vt. 421, 92 Atl. 970. Moreover, such a concession would, in view of the statute, be for our consideration only when shown by the findings or in some proper way made a part thereof.

The plaintiff also insists in the brief that our reference to the defendant's admission of liability was erroneous, and that we therein “mixed up” the two suits. This alleged mistake is not specified in the motion and first appears in the brief. It is therefore waived and not availing. 4 C. J. 635. But if we treat the motion as amended so as to cover it, it would not change the result. A reexamination of the findings shows that our understanding of the matter was correct. The findings do not show when this admission was made, or how long the rent referred to had been overdue.

Motion denied. Let full entry be made and certificate go down.

EDWARD E. FARMER v. JOHN D. WILLIAMS.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed January 22, 1918.

Evidence—Admissibility—Instructions to Jury.

In an action to recover borrowed money, inquiry of plaintiff on cross-examination whether he had ever loaned money to any one except defendant, and his answer that he did not remember that he had, were inadmissible, and, under the circumstances, constituted prejudicial error.

In an action to recover borrowed money, evidence offered by plaintiff, that at sometime before the loan he told the witness that defendant wanted to borrow the money from him, was properly excluded. It is not error to allow the contradiction of evidence not responsive, and yet in its nature prejudicial.

In an action to recover borrowed money, wherein defendant claimed that the money was not loaned by plaintiff but by another person, since deceased, evidence that defendant repaid the money to such person is admissible, no contract between the latter and defendant being in issue.

In an action to recover borrowed money, wherein defendant claimed that the money was not loaned by plaintiff, but by another person and was repaid by him to such person, evidence that defendant was in funds at the time of the claimed payments, or some of them, is inadmissible, and, when received, constitutes prejudicial error.

In an action to recover borrowed money plaintiff was not entitled to an instruction that the jury must find from the evidence that defendant had the use of plaintiff's money in the amount claimed.

CONTRACT. Plea, the general issue. Trial by jury at the September Term, 1916, Rutland County, *Butler, J.*, presiding. Verdict and judgment for defendant. Plaintiff excepted. The opinion states the case.

M. C. Webber, J. B. McCormick and J. P. Leamy for plaintiff.

J. C. Jones, Lawrence, Lawrence & Stafford and E. J. Lockwood for defendant.

HASELTON, J. This is an action of contract. Trial by jury was had, and verdict and judgment were for the defendant. The plaintiff excepted. The defendant and the plaintiff's wife are brother and sister. Their father, David J. Williams, lived with his daughter and her husband, the plaintiff, at their home in Poultney. The father died before the commencement of this suit. In December, 1909, the defendant borrowed \$2,100, and gave no note therefor. So far the parties agree. The plaintiff's claim is that half of this sum, \$1,050, was borrowed of him and in part and in part only repaid. The defendant's claim is that he borrowed no money of the plaintiff, but borrowed the whole amount of \$2,100 of his deceased father and that the loan was repaid by him to his father, that he borrowed none of the money of the plaintiff, owed him nothing and had paid him nothing on account of the loan in question.

The plaintiff's evidence tended to show that the defendant applied to his father for a temporary loan of \$2,100, that the father said he hadn't the amount where he could get it, that he said he could let the defendant have \$1,050, half of the amount asked for, and that the plaintiff's wife, who was present, said that if her husband had the mind to, he could let the defendant have the other half of the amount asked for; that, at the request of the defendant, Mrs. Farmer went to Rutland where her husband the plaintiff was working; that the outcome was that the father, who had \$1,200 in the Rutland Savings Bank, gave his note to the bank for \$1,050, giving his bank book as security, and that Mr. Farmer, the plaintiff, who had \$1,100 in the same bank, gave his note to the bank for \$1,050, giving his bank book as security; that for these notes a New York draft for \$2,100, payable to the plaintiff was delivered to the plaintiff's wife, that the plaintiff cashed the draft at the Poultney bank and handed the proceeds to his wife who handed them over to her brother, the defendant. The bank books, the notes and the cashier's draft above referred to were in evidence and indicate that the money was raised in the way that the oral testimony on the part of the plaintiff tended to show. The plaintiff's testimony tended to show that he loaned \$1,050 or one half of the total sum loaned and that the defendant so understood it. The defendant testi-

fied that he didn't know how the money was raised, but that he asked his father for the loan, that at first his father said he didn't know whether he would make the loan or not, but that after some talk he said to his daughter, the plaintiff's wife, "You go to the Rutland bank and get that money," that Mr. Farmer's name wasn't mentioned, that later Mrs. Farmer handed the defendant the money saying "John, here is the money that father sent down to you."

The plaintiff having testified to the loan by him to his brother-in-law of \$1,050, the cross-examiner was allowed, under objection and exception, to inquire of the plaintiff if he had ever loaned money to any one except the defendant. The plaintiff's testimony was that he didn't remember that he had. The defendant claims that the question and answer were competent to impeach the witness. But they were not. No discussion of this claim is necessary. *Welch v. Ricker*, 69 Vt. 239, 39 Atl. 200; *Jones v. Ellis' Est.*, 68 Vt. 544, 35 Atl. 488; *Harris v. Howard's Est.*, 56 Vt. 695; *Walworth v. Barron*, 54 Vt. 677; *Phelps v. Conant*, 30 Vt. 277; *Comstock's Admr. v. Jacobs*, 84 Vt. 277, 78 Atl. 1017, Ann. Cas. 1913 A, 679; *Slack v. Bragg*, 83 Vt. 404, 76 Atl. 148; *Richardson v. Baker*, 83 Vt. 204, 75 Atl. 151.

The defendant here claims that the testimony was relevant to the matter of the agency of the plaintiff's wife. But the question put in no way related to the agency of the plaintiff's wife in making loans or in doing anything else. The testimony was wholly irrelevant and came within no principle of cross-examination. The defendant suggests that, if in fact the evidence was immaterial it was harmless. But we think it was prejudicial. It had in fact no probative value, but since the court admitted it, it gave ground for a fallacious claim and argument calculated to mislead the jury.

The plaintiff offered to show that at sometime before the time of the loan he told one Haig that the defendant wanted to borrow money from him to purchase some real estate. The plaintiff offered to show this by Haig. There was no offer to show that the plaintiff expressed any intention to loan the money. Evidence under this offer was excluded and its exclusion was correct. The offer did not make the matter a part of the *res gestae* as the plaintiff claims. *Elkins v. Hamilton*, 20 Vt. 627; *State v. Ryder*, 80 Vt. 422, 68 Atl. 652.

In cross-examination of the plaintiff's wife she was asked in substance if she ever said anything to the defendant's wife to the effect that the defendant owed the plaintiff for borrowed money. The witness answered "Yes," and being asked "How many times," she volunteered details of a time when, as she said, the defendant was terribly drunk and was making trouble around his home. Her testimony as to this occasion, the defendant's wife was allowed, under objection and exception, to contradict. It was not error to allow this contradiction of evidence not responsive and yet in its nature prejudicial. *Fairchild v. Northampton, etc., Ins. Co.*, 51 Vt. 613; *Ellsworth v. Potter*, 41 Vt. 685.

In connection with the defendant's claim that the loan in question was made him by his father and not by the plaintiff, the defendant testified that he had paid it back to his father in the life time of the latter. This testimony was received, under objection and exception, as relating to a circumstance bearing upon the issue of whether the money was borrowed of the plaintiff or of the defendant's father. In the state of the evidence, we think the fact testified to, if it was a fact, was a circumstance bearing upon the question in issue, and that, as no contract between the defendant and his father was in issue and on trial, the fact that the father was dead did not make the testimony inadmissible. *Manufacturers' Bank v. Schofield*, 39 Vt. 590; *Cole v. Bond's Est.*, 41 Vt. 311, 98 Am. Dec. 587; *Downs v. Belden*, 46 Vt. 674.

The defendant testified as to the sources from which the money came with which he paid his father, and introduced the testimony of one Ripley and certain checks given by Ripley tending to show that the defendant was in funds at the time of the claimed payments or some of them. All this was under objection and exception. As a general rule the fact that one could have paid a debt is not evidence that he did. *Atwood v. Scott*, 99 Mass. 177, 96 Am. Dec. 728; 1 Wigmore, Sec. 89. In various circumstances the rule does not apply. See *Gilfillan v. Gilfillan's Est.*, 90 Vt. 94, 96 Atl. 704, and cases there collected. But here to the extent of several hundred dollars, the question was not whether the defendant had paid, but whether he had paid to the plaintiff, as the plaintiff claimed, or had paid to the defendant's father, as the defendant claimed. On that question the possession of funds by the defendant could have no bearing,

and yet as the evidence came in the jury naturally understood that the possession of the requisite funds to pay the whole indebtedness supported the defendant's claim that he paid all to his father and nothing to the plaintiff. Here was prejudicial error.

Several exceptions were taken to portions of the charge to the jury wherein the court touched upon the matter of the estoppel of the plaintiff to show and rely upon the truth of the matter if he was the undisclosed principal of his wife and if she falsely represented to the defendant that the money loaned was the money of her father, and the defendant relied upon such representations, and in reliance thereon repaid the loan to his father. The plaintiff claims, among other things, that the charge as to those and kindred matters was not applicable to the evidence, and in view of the necessity of a new trial for errors in relation to evidence, we deem it unprofitable here to analyze the evidence and the charge as they stood in the trial under review in their relation to the matters complained of.

The plaintiff excepted to the refusal of the Court to comply with a request that the jury be charged that they must find from the evidence that the defendant had the use of \$1,050 of the money of the plaintiff. But we do not think that the plaintiff was entitled to a binding instruction to that effect. After verdict and before judgment the plaintiff moved to set aside the verdict. This motion was overruled and the plaintiff excepted. The reasons for not analyzing the evidence for the purpose of considering the charge and the refusal to charge apply to this exception, particularly as the decision gives the plaintiff a new trial.

Judgment reversed and cause remanded.

BOSTON & MAINE RAILROAD v. UNION MUTUAL FIRE INSURANCE
COMPANY.

January Term, 1917.

Present: MUNSON, C. J., WATSON, HASLTON, POWERS, and TAYLOR, JJ.

Opinion filed, October 2, 1917.

*Insurance—Unpaid Assessments—“Expenses and Discounts”—
Agreements for Compromise of Disputed Claims—Tender—
When not Required—Specific Performance—Averment of
Willingness to Perform—Time for Performance—Delay—
Equitable Relief.*

An unpaid assessment on a fire insurance policy, which had been deducted by the insurer from the amount due the insured under said policy for a loss, is not included in the term “expenses or discounts” in an offer made by one charged with liability for the fire to pay the insurer fifty per cent. of the actual amount paid to the insured “with no allowance for expenses or discounts.”

An unpaid assessment on a fire insurance policy is a valid debt due from the insured to the insurer, and may be properly used by the latter in part payment of a loss under said policy.

Agreements fairly entered into for the compromise and settlement of disputed claims are favorably regarded in a court of equity, and are supported as beneficial in themselves and conducive to peace and harmony, when this can be done without making injustice, and does not override other principles upon which courts of equity proceed in the specific enforcement of contracts.

After an agreement of settlement has been made, a suit brought upon the alleged original liability is notice of the attempted rescission of the agreement, and the necessity of a tender of the sum due under the agreement, if it before existed, is obviated, because it would be useless and is therefore not required.

Where, after an attempted rescission of an agreement of compromise, by bringing suit upon the alleged original liability, the defendant therein brings a bill in equity for the specific performance of the agreement, it is sufficient to aver in the bill, a readiness and willingness to perform in compliance with the terms of the agreement, and an offer to do so.

Where no time is set for the performance of an agreement of compromise, a reasonable time is allowed by law, and, while time is not essential to the performance of the contract, it is material.

Delay in the performance of an agreement of compromise will not prevent a decree of specific performance, where the state of things as it was before the making of the agreement cannot be restored, and the situation has not been so altered that the decree would be inequitable, nothing but money being due and the payment of interest thereon being, in equity, full compensation for the delay.

After a loss by fire, claimed to have been caused by plaintiff's negligence, six insurance companies which had insured the property settled the loss, and by agreement became subrogated to the rights of the insured against the plaintiff. Plaintiff offered to settle by paying to the companies fifty per cent. of the amounts paid by them to the insured, with no allowance for expenses or discounts. The offer was accepted by the insurance companies, but defendant, one of the insurers, refused to accept the sum offered because the amount of an unpaid assessment, due from the insured to defendant at the time of the fire, was deducted therefrom. After suit had been commenced by defendant against plaintiff to recover the entire amount paid by it to the insured, and judgment rendered on the pleadings against plaintiff, the latter brought a bill in equity to enjoin the suit at law, and to compel the enforcement of the agreement of settlement. *Held*, plaintiff was entitled to the equitable relief sought.

APPEAL IN CHANCERY. Heard on bill, answer, report of special master, and plaintiff's exceptions thereto at the March Term, 1916, Washington County, *Waterman*, Chancellor. Decree, overruling plaintiff's exceptions to the report, and dismissing the bill, with costs to defendant. Plaintiff appealed. The opinion states the case.

George B. Young and Walter H. Cleary for plaintiff.

Porter, Witters & Harvey for defendant.

WATSON, J. When this case was here before, the bill was held sufficient on demurrer, and the cause remanded. 83 Vt. 554, 77 Atl. 874. The cause being then heard before a special master, and exceptions to his report filed by the plaintiff, the chancellor rendered a decree overruling the exceptions and dismissing the bill with costs to the defendant. Therefrom the plaintiff appealed.

The bill is brought to enjoin the defendant from prosecuting a certain action at law against the plaintiff, and for the specific enforcement of an agreement made between the plaintiff and the defendant and six other insurance companies and Cushman and Rankin Company.

It appears from the master's report that on or about May 12, 1905, the factory, machinery, and stock of Cushman and Rankin Company, located at Lyndon, this State, were consumed by fire, and that the defendant company and six other insurance companies were insurers of the property against such loss. It was claimed by the insurers and the insured that the fire originated from sparks communicated by one of the plaintiff's locomotive engines. This claim was denied by the plaintiff. The loss was entire. The insurers settled with the insured on the basis of total loss, and by agreement were subrogated to the rights of the insured.

On November 22, 1905, the plaintiff made an offer in writing, in the nature of a compromise, in reference to the claims arising out of the burning of the property, as follows: "We will pay fifty per cent. of the actual amounts paid to Cushman & Rankin by the insurance companies, with no allowance for expenses or discounts. We will pay to Cushman & Rankin fifty per cent. of their actual loss over and above the amount of insurance received by them, such loss to be determined in the following manner, to wit," This proposition was accepted by the insured, and by all the insurers, including the defendant. Both the plaintiff and the defendant entered into this agreement contingent upon all the other parties, coming into the settlement. The exact amount of the loss had not then been ascertained.

Nothing was said in making the offer nor in its acceptance about any release. But it was understood, expected, and intended by every party that on the payment to the insurance companies of fifty per cent. of the amount paid by them to the insured, they would release the plaintiff from any claim of liability or damage they might have against the plaintiff by reason of the burning of the property of the insured. And it was understood by all the parties, though not stated, that the settlement would be for cash.

On July 10, 1906, Henry O. Cushman, who represented the insured, wrote from his office in Boston to the defendant, that the

plaintiff was "ready to pay the portion of the Lyndon fire loss agreed upon," and enclosing a release which he said had been similarly drawn for each insurance company, asking the defendant to have it signed and returned at the earliest moment possible; further stating that the plaintiff would not deliver a check for any one loss until all receipts had been returned, and therefore it was for the interest of the defendant, as well as of others, that they be returned immediately. The release was returned by the defendant under date of July 14, unsigned, for two reasons: (1) that it was not sufficiently specific as to the loss or liability covered; and (2) the amount stated therein was \$741.55, whereas it should be \$750. Regarding the first reason, it is enough to say that the defendant made and executed a release in terms satisfactory to itself, and forwarded the same to Cushman under date of July 23, 1906, which in this respect was also satisfactory to the plaintiff. This release was, however, rejected by the plaintiff because the money consideration stated therein was \$750, instead of \$741.55. This position was taken by the plaintiff because its offer of compromise (which was accepted) was to pay fifty per cent. of the actual amounts paid to the insured by the insurers, "with no allowance for expenses or discounts," claiming that the latter sum was fifty per cent. of all the defendant paid, and that if the \$16.90 (mentioned below) came into the matter at all, it was covered by the words "expenses or discounts," used in the offer. The defendant claimed that it paid the face of its policies, \$1,500; that at the time of payment the insured owed the defendant \$16.90, as and for an assessment due it at the time of the fire, and the defendant paid itself, or offset, that sum, giving the insured a check for the balance. The master finds the facts connected with the \$16.90, to be as claimed by defendant. We think the latter's position in this respect was in accordance with the intended and reasonable meaning of the compromise agreement. That item was not "expenses or discounts." It was a valid debt due from the insured to the defendant, and as such could be and was used in part payment of the sum due from the latter to the former under the terms of settlement; and when so used, it properly became a part of the actual amount paid.

In sending the release last mentioned to Cushman, the defendant accompanied it with a letter stating that the release was made to read \$750, as that was the amount which, by its books,

the company actually paid; that the deduction was for assessments which were due defendant up to the date of the fire; that defendant would not, however, insist upon the payment of the sum of \$750, for the reason that it did not desire to delay settlement, and if the plaintiff still refused to pay that sum, defendant would accept the \$741.55.

It appears from the record that thereupon Mr. Rich, the general counsel for the plaintiff railroad company, who had these matters in charge, with full knowledge of the contents of the several letters from defendant to Cushman, and of the claim of the former concerning the \$16.90, performed the agreement of compromise as to the insured and the other insurers, respectively, paying them in the aggregate the sum of \$8,845.91, or \$8,850.91, but took no further steps toward the performance thereof as to the defendant.

Thus the matters stood until the 27th day of August, 1908, when the defendant brought for its benefit, in the name of the insured, an action at law against the plaintiff railroad company, to recover for the loss sustained by the fire. Therein the railroad company pleaded the release received by it from the insured under the compromise agreement, as a bar to the action, and to the replication filed to such plea, setting up this defendant's rights by subrogation, and that the suit was brought for its benefit, the railroad company interposed a demurrer and, the same being overruled, took an exception and thereon brought the case to this Court. The judgment of the lower court, upholding the replication, was affirmed and the cause remanded in October, 1909. Within the following month these equity proceedings were instituted to have the prosecution of the suit at law perpetually enjoined, and the compromise agreement specifically enforced. A temporary injunction was issued and is still in force.

The master states that the plaintiff is not, and never has been, ready and willing to pay the defendant fifty per cent. of the amount the latter paid the insured, that it did not pay at the time defendant returned the release duly executed, "and has never since been ready and willing to pay \$750, which was the amount proposed in the orator's offer, and even now does not place itself on that ground in the bill now pending, but therein alleges the amount to be \$741.55." Fairly understood, this finding is tantamount to saying that the plaintiff is not now and never has been ready and willing to pay defendant \$750,—not

that plaintiff has not been, and is not now, ready and willing to pay \$741.55. It is true that in the tenth and eleventh paragraphs of the bill, the plaintiff alleges in substance that it has been and now is ready and willing, and has offered, to pay the defendant the sum of \$741.55, in accordance with the terms of the agreement. But its averments and offer in the fifteenth paragraph are broader as to amount, being "that it is now ready and willing to pay and hereby offers to pay . . . the one-half of all the money which the defendant herein paid to thee" insured by reason of the burning of the latter's property, "in compliance with the terms of said agreement."

A comparative examination of the facts found by the master, and those alleged in the bill which, on demurrer, were held sufficient to entitle the plaintiff to the relief sought, show no material difference in matters essential to the plaintiff's case, except the difference of \$16.90 in the sum paid by the defendant to the insured, and except further in respect to the plaintiff's willingness, desire, and offer, to perform the compromise agreement.

We have already noticed that the said variation of \$16.90 was at most a dispute as to how that item, a mere subordinate matter, should be treated in determining the actual amount paid by defendant to the insured, in view of the phrase in the agreement, "with no allowance for expenses or discounts," and each party acted according to its own view. Whatever the actual amount paid proved to be under the proper interpretation of the agreement, the plaintiff was bound to pay, and the defendant to accept, fifty per cent. thereof in settlement. So the difference in the views of the parties in this respect, constituted no real obstacle in the way of executing the agreement within such time as, in the circumstances, would reasonably answer the requirements of its provisions. Indeed, by its letter of July 23, 1906, to Cushman, of which the plaintiff's general counsel had knowledge, the defendant offered to accept the smaller sum if the plaintiff still refused to pay the larger. If this difference had previously been such an obstacle, it was no longer so.

The agreement included as parties each and all the insurers, the insured, and the railroad company, as required by the latter and by defendant. It in terms covered all matters between the railroad company and each and all the other parties named, growing out of the burning of the insured's property. The

claims being made against the railroad company were doubtful in character. The contract was single and entire, the consideration of which was the mutual promises of the parties. It was fully performed by the insured, by all the insurers except the defendant, and by the railroad company except as to the defendant's claim. Nothing remains to be done to effect a full performance by all the parties interested, except the payment by the plaintiff company to the defendant of the sum due it under the compromise, and the giving of a release by the latter. The agreement was without fraud or imposition. It was certain, fair, and just in all its parts. Agreements fairly entered into for the compromise and settlement of disputed claims are favorably regarded in a court of equity, and are supported as beneficial in themselves and conducive to peace and harmony, when this can be done without working injustice, and does not override other principles upon which courts of equity proceed in the specific enforcement of contracts. 5 R. C. L. 901. This same case, 83 Vt. 554, 77 Atl. 874.

The plaintiff's delay in performing the contract as to the defendant since the latter instituted its suit at law is sufficiently accounted for. The bringing of that suit based upon the alleged original liability of the plaintiff to the insured was notice to the former of the defendant's attempted rescission of the agreement of compromise, and the necessity of a tender by the plaintiff of the sum due defendant under the terms of that agreement was obviated, if it before existed; for a tender would then have been useless, and was not required. *Van Dyke v. Cole*, 81 Vt. 379, 70 Atl. 593. By pleading in defence of the action at law, the release given by the insured in execution of the agreement, the plaintiff undertook to stand upon the agreement as still existing; and when the ruling of this Court was had against it on the pleadings in that case, the plaintiff, without unreasonable delay, filed its bill asking that the agreement, as to the defendant's claim, be specifically enforced. In the circumstances existing, the plaintiff was justified in instituting proceedings at once to compel such enforcement, and in so doing it was enough to aver in the bill the plaintiff's readiness and willingness to perform in compliance with the terms of the agreement, and an offer so to do. 3 Pom. Eq. Sec. 1407; *Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495. See *Amsden v. Atwood*, 68 Vt. 322, 35 Atl. 311.

The failure of the plaintiff to perform the contract as to the

defendant before the latter brought the suit at law, has not been so satisfactorily explained. Time was not essential in the performance of the contract, but it was material. *Burton v. Landon*, 66 Vt. 361, 29 Atl. 374. No time was fixed by the agreement within which it should be performed, and consequently a reasonable time was allowed by law. If the contract were wholly between the plaintiff and the defendant, such a delay without showing circumstances reasonably excusing the same would very likely defeat the right to the remedy sought. Mr. Pomeroy says, "If time is material a failure to comply with the terms of the contract is not *necessarily* a bar to an enforcement; but it throws upon the defaulting party the burden of explaining his neglect and of satisfying the court that, notwithstanding the failure, a denial of the remedy to him would be inequitable." Pom. Con. 402. And in *Walker v. Jeffreys*, 1 Hare (23 Eng. Ch.) 341, Vice Chancellor Wigram says: "The general rule in equity I take to be, that a party who asks the court to enforce an agreement in his favor must aver and prove that he has performed, or been ready and willing to perform, an agreement on his part. Where, however, the strict application of that general rule would work injustice, the court will relax it. A breach of an agreement may have been committed, for which a jury would only give a nominal damage. A breach may have been committed, which a jury would consider as waived: and if the party committing those breaches has substantially performed other parts of the agreement, whereby, at his expense, the other contracting party has derived benefits under the agreement, a court of equity might fail in doing justice, if it refused to decree a specific performance."

The state of things as they existed before the making of the agreement cannot be restored by returning to the plaintiff what it paid to the several other parties under the compromise. The situation of the defendant and its relations to its claim covered by the agreement have not been so altered that a specific execution would be inequitable. Nothing is due it from the plaintiff under the agreement but money, and for the delay in the payment of that, interest thereon is in equity full compensation. Such order can be made as to the costs in the suit at law as to the court seems just and equitable. The agreement having been thus executed in respect to the claims of all the parties except the defendant, it is but common justice that it be carried into execution in respect to the claim of the defendant also. If specific en-

forcement be refused and the defendant allowed to repudiate the agreement and prosecute the suit at law to final judgment on its original claim, it would operate as a fraud upon the other insurers and the insured, whose coming into the settlement the defendant made essential to its own participation therein, and as to whom the agreement was fully executed before the defendant's attempted repudiation. By reason of the special circumstances of the case, and to prevent such fraud and injustice, specific performance would seem to be indispensable to justice; and a denial of such remedy would be inequitable to the plaintiff.

The plaintiff being entitled to relief on the facts reported, none of its exceptions have been considered.

Decree reversed and cause remanded with directions that a decree be entered, that upon the payment by the plaintiff to the clerk of the court of chancery within and for the county of Washington, for the benefit of the defendant, the sum of \$750 with simple interest thereon at six per cent. from the first day of September, 1906, to the day of payment, together with the taxable costs of the plaintiff named in the said suit at law, to the time of the bringing of this suit in equity, less the taxable costs of the plaintiff in this equity suit, and also less this plaintiff's taxable costs as defendant in the said suit at law after the bringing of this suit in equity, both of which are to be paid by the defendant (Union Mutual Fire Insurance Company), then the prosecution of the said suit at law shall be perpetually enjoined, and the defendant in this suit in equity shall immediately execute in due form and deliver to said clerk of court, for the benefit of the plaintiff, a release to the plaintiff, which shall be in compliance with the provisions of the said compromise agreement: Provided that if the plaintiff shall fail to comply with the foregoing provisions of the decree within thirty days after the entry of the decree by the chancellor, pursuant to this mandate, then the bill in this case shall be dismissed with costs to the defendant, and the defendant left to prosecute the said action at law as it may be advised.

EDWARD J. SPINNEY'S ADMINISTRATRIX v. O. V. HOOKER & SON.

May Term, 1916.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

*Trial—Examination of Jurors—Reversible Error—Evidence—
Report of Accident—Conclusions of Witness—Admission of
Agent—When Admissible—Experts—“Res Ipsa Loquitur”
—Negligence—Jury Question—Master and Servant—Duty
of Inspection—Proximate Cause—Assumption of Risk—
Contributory Negligence.*

A litigant is entitled to a reasonable measure of latitude in ascertaining who the jurors are, and what are their relations and affiliations, but this must be accomplished so far as possible without prejudicing the jurors against the adverse party; and so, in a negligence case where an insurance company is the real defendant, it is proper to bring the fact to the attention of the court, but it is improper and unnecessary and constitutes reversible error, baldly to announce it in the hearing of the jury.

A written report made by an official of a corporation to an insurance company, concerning an accident to an employee of the corporation, is not admissible in evidence against the corporation unless it is shown to have been made while the official was acting within the scope of his agency.

The testimony of a manager of a corporation that he made a report of an accident to an insurance company as a part of his duties as manager, without testifying further in regard thereto, is a conclusion drawn by the witness, and is not alone sufficient to establish the official character of the report and make it admissible in evidence.

A statement or admission of an agent, in order to bind his principal, must be one of fact, and the agent's opinions, inferences, conclusions and judgments are ordinarily to be rejected; and so, the statement of the manager of a corporation, in making report of the circumstances of the death of an employee, that the insulation of an electric cord was "worn off" is not admissible against the corporation.

- In an action against a corporation to recover for the death of an employee, due to defective insulation of an electric cord, it was error to allow a witness to testify that he knew of no reason why the deceased should regard it as dangerous to take hold of the cord, the question being, not what the witness knew about it, but, what the facts were.
- In an action against a corporation to recover for the death of an employee, due to defective insulation of an electric wire, it was not error to allow an expert electrician to testify in regard to the different ways in which a ground could be produced.
- In such case it was not error to allow an expert electrician to testify that unless there was a ground, a person would not get a harmful shock by touching the bare wires, this evidence being admissible on the question of the degree of caution which the law required of the employer who asked his men to work in such surroundings.
- In such case, evidence of the manager of the defendant corporation regarding the precautions taken by the defendant to prevent grounds is admissible, although the declaration did not declare upon that ground as the negligence sued for, but upon defective insulation, because the latter would have been harmless if the former had not existed.
- In such case, evidence of the manager that no precautions were taken by the defendant to see that the insulation on the wires was well preserved was admissible.
- In such case an exception to the admission of evidence to the effect that moving the electric lamp from place to place would cause the insulation on the cord to break away, was without merit, the witness being qualified to speak as an expert upon the matter, and there being evidence that the cord, when not in use, was coiled up and hung on a peg.
- In an action to recover for the death of plaintiff's intestate, caused by coming in contact with an electric wire, the insulation of which had worn off, testimony of the wife of the deceased that her husband knew nothing about electricity, was inadmissible.
- In such case, evidence of various witnesses that deceased had talked with them about the dangers of his employment, but made no mention of dangers from electricity, and also other evidence calculated to show that he was ignorant of such hazards, was admissible.
- Where it appeared that plaintiff's intestate, an employee of defendant, was found dead at defendant's foundry under circumstances warranting the inference that he was electrocuted when he turned on

an electric light, furnished by defendant for use by plaintiff's intestate in his work, the insulation of the cord of which was worn off, the maxim *res ipsa loquitur* applied and a *prima facie* case of negligence was made out.

In an action against a corporation to recover for the death of an employee caused by the defective insulation on an electric cord, the fact that it would naturally take some time for the insulation wholly to disappear, together with evidence of the extent to which it was worn away, and that slight shocks had been previously received therefrom, was enough to carry the case to the jury on the question whether this condition had existed before the accident and for so long a time that defendant ought to have discovered it.

Where an electric light and cord is furnished by an employer for use by its employee in doing his work, it is the duty of the employer to exercise constant and active vigilance of a searching character to keep this apparatus safe; and it is for the jury to say whether such inspection as this duty required would have discovered that the insulation on the cord had become worn off.

Where plaintiff's intestate was killed by an electric current from a grounded wire by coming in contact with an electric wire, the insulation of which had become worn off, the lack of insulation was a proximate cause of the accident, in causal relation, stood next to the effect, and was a cause *sine qua non*.

There may be more than one proximate cause concurring to produce a result.

In an action against an employer to recover for the death of an employee, the questions of assumption of risk and contributory negligence, were, upon the evidence, for the jury.

CASE FOR NEGLIGENCE. Plea, the general issue. Trial by jury at the December Term, 1913, Caledonia County, *Fish, J.*, presiding. Verdict for plaintiff. Defendant excepted. The opinion states the case.

John W. Redmond and *Charles H. Darling* for defendant.

Porter, Witters & Harvey and *F. S. Rogers* for plaintiff.

POWERS, J. This is a common law action for negligence brought by the administratrix of Edward J. Spinney, who was electrocuted while at work for defendant in its foundry. It was

a part of Spinney's duties to line the cupola with moist clay preparatory to melting iron therein. This cupola was of iron or steel and stood upon legs high enough to enable a man to crawl under it. It had a metal floor, through the center of which was an oval man-hole with an iron cover. When called upon to line the cupola, Spinney would crawl under it, remove the cover of the man-hole and lay it on the ground. He would then stand up in the man-hole, his feet resting on the iron cover, and coat over the inside of the furnace part of the cupola with the soft clay, using his bare hands for the purpose. There was a slag-hole in the back side of the cupola and the clay had to be pressed around an iron pipe therein; and this was usually the last thing done in the process. In order to do this work, it was necessary to have the inside of the cupola lighted in some way, so the defendant furnished an electric light for that purpose. This was attached to an ordinary extension cord which plugged into a socket in the room above, and when it was in use was let down into the cupola through the feed door and hung against the side of the cupola. This light was turned on and off by the usual hard rubber key, and was in all respects like the lamp in common use. The current which supplied this lamp came from an electric plant owned and operated by the defendant located just across the river from the foundry. The day before Spinney met his death, he was directed to line up the cupola, and he proceeded to do so using the electric light as usual. He finished this work, except the slag-hole, and turned off the light and quit for the day. It had been raining for several days; and it rained all that night. The next morning Spinney went to work in the rain without protection, and got his feet and clothing very wet. He was directed to finish the cupola and entered it to do so. Soon after, his lifeless body was found there under circumstances warranting the inference that he was electrocuted when he turned on the electric light. After his body had been removed, it was discovered that the insulation was gone from the wires entering the socket of this lamp for a distance of one-fourth of an inch. The system which supplied the current to the foundry was a three-phase system, and the case shows that one of the three wires must have been grounded at the time of the accident to enable Spinney to get a fatal shock from the wires supplying the lamp. The case also shows that if the wires had been properly insulated the ground would not have caused the accident.

During the examination of the jurors, and when counsel were at the bench, one of the attorneys for the defendant informed the court that his client had a liability policy in the American Fidelity Company of Montpelier, and he asked for an exception in advance to any inquiries that might be made by the plaintiff's counsel which involved that company. Such an exception was not granted, but counsel were cautioned by the court regarding the matter. Afterwards, counsel for the plaintiff asked the jurors if any of them were stockholders in the American Fidelity Company of Montpelier, and when counsel for the defendant objected and claimed an exception, replied that "evidence in this case as already put upon the record is that this company is interested in this case"; and after some discussion, and after the question was repeated, an exception was allowed,—which exception, we take it from the whole record, was intended to cover both the question and the statement.

The questions raised by this exception have caused the courts no little perplexity and have resulted in some confusion and loose statements in the cases. The simple fact is that no general rule has or can be formulated that will accurately apply to every case. Much depends upon the good faith of counsel. That a litigant is entitled to a trial before an impartial and disinterested jury is fundamental. He must be given a reasonable opportunity to secure such a panel. He cannot do this unless he is given a reasonable measure of latitude in ascertaining who the jurors are and what their relations and affiliations are. This, however, must be accomplished, so far as possible, without prejudicing the jurors against the adverse party. In the case in hand, an insurance company was the real defendant. Its stockholders and officers were legally disqualified to sit in the case, and its agents and servants subject to challenge in the discretion of counsel. It was proper to bring these facts to the attention of the court, but it was improper and unnecessary to baldly announce the facts in the hearing of the jury. It is possible in such cases for an attorney, who is acting in good faith and with a proper regard for the rights of his adversary, to elicit all necessary information without disclosing to the jurors the reason prompting his inquiries. And without attempting to mark out a definite course to be pursued, which might be a difficult undertaking, we hold that counsel here overstepped the bounds of fair and legitimate practice, and sustain the exception.

The plaintiff called F. B. Hooker, manager of the defendant, as a witness, and in connection with his testimony was allowed, subject to exception, to put in evidence a written report of this accident made by him on the day it took place to some undesignated person or corporation. Counsel agree that this report was made to the American Fidelity Company, and we so treat it. Though reports of this character were held to be admissible in *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563, 74 Pac. 147, and *Sibley v. Nason*, 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. Rep. 520, 12 Ann. Cas. 938, this one was inadmissible. If it was evidence at all, it was in the nature of an admission, and the question involved is quite like one of agency. Whatever an agent says or does in the execution of his agency is admissible against his principal. *Austin v. Chittenden*, 33 Vt. 553. But unless it appears that the agent was then acting within the scope of his agency, his statements or admissions are not so admissible. *Folsom v. Underhill*, 36 Vt. 580; *Hardwick S. B. & T. Co. v. Drenan*, 72 Vt. 438, 48 Atl. 645; *Taplin & Rowell v. Marcy*, 81 Vt. 428, 71 Atl. 72; *Blunt v. M. & W. R. R. Co.*, 89 Vt. 152, 94 Atl. 106. Declarations of an officer or agent, not of an official character, or not connected with acts of agency, and not, therefore, a part of the *res gestae*, are mere hearsay and inadmissible. 1 Elliott, Ev. § 254. The foundation for the receipt of this report was not laid. How or why it was made does not appear. The purpose it was expected to serve is not shown. The plaintiff argues that this report was made for the purpose of bringing in the Fidelity Company to defend the suit,—that company having insured the defendant, and that it was made pursuant to a requirement of the policy. But all this is outside the evidence. The fact that counsel informed the court that the American Fidelity Company was an insurer of the defendant did not afford evidence of that fact before the jury, and does not aid the plaintiff in her present claim. It is true that Mr. Hooker testified that he made the report as a part of his duties as manager; but this was subject to objection and exception. The fact stated obviously depended upon other facts not in evidence and was a conclusion drawn by the witness therefrom. All he could lawfully do was to state the facts and let the jury determine his authority in the matter. The official character of the report was, therefore, unproved and it stood as a mere personal statement, inadmissible, because hearsay.

Moreover, the only statement contained in it of any consequence in the case is that the insulation of the cord was "worn off" about a quarter of an inch just above the socket. If Mr. Hooker had merely stated that the insulation was found to be gone for the distance specified the whole paper would have been harmless, for all agreed that such was the fact. But there were two theories as to how this happened: The plaintiff claimed that it was worn off by the use of the lamp, and the defendant claimed it was burned off at the time of the accident. The statement in the report corroborated the plaintiff's theory. But no one knew how this was. It was all a matter of opinion. And Mr. Hooker's statement in the report was merely his opinion or inference regarding it. It is one of the requisites of the rule, that in order for an agent to bind his principal by a statement or admission, his declaration must be one of fact. His opinions, inferences, conclusions, and judgment are, ordinarily, to be rejected. 2 Chamb. Ev. § 1342; *Boston & Maine Railroad v. Ordway*, 140 Mass. 510, 5 N. E. 627; *Ohio & Miss. R. R. Co. v. Stein*, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733; *Mustain v. Williams*, 7 Ky. Law Rep. 828; *Warner v. Maine Central R. R. Co.*, 111 Me. 149, 88 Atl. 403, 47 L. R. A. (N. S.) 830; *American T. & L. Co. v. Baker-Whiteley Coal Co.*, 111 Md. 504, 75 Atl. 341. Any exception that there may be to this rule is not involved in this case. Nor does the fact that this statement is in form an assertion of fact save it; for the record shows that it could not be anything more than an inference from facts observed, or stated by others, or both. And, too, it was a conclusion as to the cause of a certain result, which is generally to be rejected. 17 Cyc. 210; *Chicago v. Powers*, 117 Ill. App. 453.

It was also error to allow Mr. Hooker to testify that he knew no reason why Spinney should regard it as dangerous to take hold of the cord just above the socket. The question was not what the witness knew or thought about it, but what the facts were. He could properly describe the observable physical condition, from which the jury could determine what Spinney saw or should have seen; but his opinion as to what Spinney should have regarded as dangerous was not admissible.

There was no error in allowing McGillivray, an expert electrician, to testify in regard to the different ways in which a ground could be produced. Nor was it error to allow Underwood, another expert, to testify that unless there was a ground,

a person would not get a harmful shock by touching the bare wires. This evidence was clearly admissible on the question of the degree of caution which the law required of the employer who asked his men to work in such surroundings. To be sure, the ground was not set up as the basis of recovery; it was the faulty insulation that the action was predicated upon. But the latter would have been harmless, had not the former existed. And if grounds were so easily caused as the evidence indicated, and created such deadly perils as the witnesses testified to, greater caution was required of the defendant to inspect and repair the insulation on the cord in question.

The evidence given by Mr. Hooker regarding the precautions taken by the defendant to prevent grounds was admissible. Here again the defendant insists that the error in receiving this evidence lies in the fact that the plaintiff does not declare upon the ground as the negligence sued for. But for the reason above stated, the defendant's position is untenable. *Parker v. B. & M. Railroad*, 84 Vt. at p. 341, 79 Atl. 865. And most clearly his testimony that no precautions were taken by the defendant to see that the insulation on the wires was well preserved was admissible, for this was most likely the very omission which caused the accident, and in and of itself afforded a basis of recovery.

Equally without merit is the exception to Underwood's testimony to the effect that moving the lamp from place to place would cause the insulation just above the socket to break away. The objection is that this is not a subject of expert testimony, and that there was no evidence that this lamp was moved from one place to another. We think the witness' technical training and his knowledge regarding the insulating material gave him the right to speak as an expert on this subject. The other claim is wholly unfounded. For, even if we concede that the record does not show that Spinney moved the lamp from place to place as he worked around the cupola—a very natural if not necessary thing to do—the evidence unmistakably shows that every time the cupola was finished the cord was coiled up and hung on a peg until it was again needed. This handling would have a tendency to cause the result specified and was doubtless in the mind of the witness when he so testified.

Mrs. Spinney was a witness in her own behalf, and was asked if Spinney knew anything about electricity, and replied that he did not. After the answer was given, objection was

made and exception allowed. The plaintiff argues that the objection came too late. But we think from the transcript that the court below treated it as seasonable. However that may be, we deem it best, in view of the fact that a retrial is to be had, to say that this testimony was inadmissible. *McCarthy's Admr. v. Northfield*, 89 Vt. 99, 94 Atl. 298.

Mrs. Spinney and certain other witnesses were allowed to testify that Spinney talked with them about the dangers of his employment and though he mentioned other hazards he made no mention of dangers from electricity and to give other testimony calculated to show that he was ignorant of these. To this line of testimony the defendant excepted. It was properly received. It came within the holding in *Barney's Adm'x v. Quaker Oats Co.*, 85 Vt. 372, 82 Atl. 113, the inquiries evidently being framed with that case fresh in mind.

At the close of the evidence, the defendant moved for a verdict on the usual grounds in such cases, and excepted when this action was overruled.

The first claim under this motion is that there is no evidence in the record tending to show that the defendant was guilty of the neglect of any duty owed Spinney proximately resulting in his injury. This claim cannot be sustained. The record presents a typical case for the application of the doctrine of *res ipsa loquitur*. It fulfills every requirement of the generally approved definition: "When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *Scott v. London Docks Co.*, 2 H. & C. 596. When the plaintiff gave evidence tending to show that Spinney met his death by use of the electric lamp, she made a *prima facie* case of negligence. The accident itself was *prima facie* evidence that the defendant was to blame for it. *Drown v. N. E. Tel. & Tel. Co.*, 80 Vt. 1, 66 Atl. 801. Though the case was of an entirely different kind, the reasoning of *Parker v. B. & M. Railroad*, 84 Vt. 329, 79 Atl. 865, is applicable: "But the defendant says that * * * negligence must be proved and cannot be presumed; and so it must; and it was proved, *prima facie*, by proving the fact of derailment * * *." So here the negligence is proved far enough to make a jury case by

proof that the electricity escaped. This is generally, if not universally so held, as is shown by the long list of cases cited on the plaintiff's brief, which are applicable here though the relations of the parties are not the same. The subtle and deadly character of the agency used makes it especially appropriate that this doctrine should be strictly applied to cases involving injuries, resulting from escaping electricity. 9 R. C. L. 1221. Moreover, there was other evidence of negligence. It appeared that after the accident, the wires were found to be bare just above the socket, and there was evidence showing that the tendency was for the insulation to break away at this point. The argument that there was nothing to show that this condition existed before the accident, or that it had existed for so long a time that the defendant ought to have discovered it is unwarranted. It would naturally take some time for the insulation to wholly disappear at the point of wear, and the extent to which it had worn away, together with the evidence that slight shocks had been previously received from this lamp, was enough to carry the case to the jury on this question. *Cross v. Pass. Fiber Leather Co.*, 90 Vt. 397, 98 Atl. 1010.

In view of the character of the agency employed, and the gravity of the consequences likely to result from inattention and neglect, it was the duty of the defendant to exercise constant and active vigilance of a searching character to keep this apparatus safe. It was for the jury to say whether such inspection as this duty required would have discovered this defect in the cord. It is urged that the ground, and not the faulty insulation was the proximate cause of the accident. We cannot agree. The lack of insulation was a proximate cause, if not the only one,—for it is well settled that there may be more than one proximate cause concurring to produce the result. 29 Cyc. 497; Note 130 Am. St. Rep. 250; *Blanchard v. Vt. Shade Roller Co.*, 84 Vt. 442, 79 Atl. 911. In causal relation it stood next to the effect (3 Bouv. L. Dict. [Rawle's 3rd Rev.] 2762), and was a *causa sine qua non*. *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 889; *Blanchard v. Vt. Shade Roller Co.*, 84 Vt. 442, 79 Atl. 911; *Dailey v. Swift & Co.*, 86 Vt. 189, 84 Atl. 603.

Nor can it be said that there was no evidence of non-assumption of risk. Spinney's previous employments were testified to by the plaintiff and were of a character tending to show that he

could have acquired no knowledge of electricity and its dangers. He had never had any experience with electric lights, even, until he engaged with the defendant. His duties in the foundry would afford no means of acquiring any knowledge of electricity, or how it should be handled to avoid its dangers. And there was other evidence, as we have already seen, warranting the inference that he did not know that the lamp was likely to become dangerous. While testimony of the kind last referred to is not altogether satisfactory, the necessities of these cases are such as to require some liberality of treatment in this regard, and we do not hesitate to apply the doctrine of the Quaker Oats case to the one in hand. To be sure, he had been warned to report any trouble or defects he might observe, but there was nothing in this to charge him with notice of this particular defect or its dangers.

So, too, the case was for the jury on the question of contributory negligence. The evidence tended to show that Spinney, wet as he was and so in the most favorable condition possible for injury by escaping current, went about his work as usual, wholly unconscious of the deadly peril he was incurring; that having prepared his clay to plaster around the slag-pipe, he reached up to turn on the light, and thus received the fatal shock. In the absence of anything charging him with notice of the dangerous conditions that might exist, this was some evidence of due care on his part.

Judgment reversed and cause remanded.

STATE v. GEORGE W. BOLTON.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 2, 1917.

Trial—Improper Remarks of Counsel—When Harmless—Criminal Trials—Notice to Respondent to Produce Evidence—When not Prejudicial—Charge—Construction—Limiting Evidence to its Impeaching Effect—Requests for Instructions—When Based upon Mistaken View of Evidence.

Improper remarks of counsel in his opening statement to the jury are rendered harmless when ruled out by the court and unreservedly withdrawn by counsel.

In a prosecution for procuring an abortion upon a girl of eighteen, the fact that respondent, after the operation, allowed the girl to go out into the world without advice is proper for the consideration of the jury as bearing upon the question whether the abortion had been caused in order to save her life.

A request by the State's Attorney that the respondent in a criminal prosecution should produce a printed card, which is promptly withdrawn, does not constitute prejudicial error.

In considering an exception to a charge to the jury, the Supreme Court will consider together all that the court said in determining whether error was committed.

Charge to the jury examined, and, *held*, not to infringe the constitutional provision that no person can be compelled to give evidence against himself, nor the statutory provision that the refusal of a respondent to testify shall not be considered as evidence against him.

It is unnecessary for the trial court to remind the jury, in the charge in a criminal case, that it is their duty to respect their oath.

A request for an instruction, in a criminal prosecution, wherein respondent did not testify, that "the respondent is to be treated as though his mouth was closed by the law," was properly refused.

In a prosecution for procuring an abortion, it is proper for the trial court in its charge, to limit to its impeaching effect, evidence introduced by respondent of the statement of the woman that she was

not able to help herself, and desired the witness, a physician, to perform an abortion upon her, such evidence having been received without objection, or limitation, and these facts having no tendency to show that respondent did not perform the operation as claimed by the State.

In a prosecution for performing an abortion, charge of the trial court, that as to whether the operation was necessary to save life the jury should take into consideration the testimony of various witnesses, *held*, without error.

No error can be imputed to the failure of the trial court to comply with a request for an instruction based upon a mistaken view of the evidence.

PROSECUTION for procuring an abortion, under P. S. 5889. Plea, not guilty. Trial by jury at the December Term, 1916, Caledonia County, *Butler, J.*, presiding. Verdict, guilty, and judgment on verdict. Respondent excepted. The opinion states the case.

Dunnett & Shields for respondent.

James B. Campbell, State's Attorney, for the State.

HASELTON, J. This was a prosecution of the respondent for procuring an abortion contrary to the provisions of P. S. 5889. The evidence on the part of the State tended to show that in June, 1916, one Anna Gunderson, a girl eighteen years of age, was pregnant, and that the respondent performed an operation upon her for the purpose and with the intent of causing a miscarriage, the same not being necessary to preserve her life. On trial the respondent was found guilty and sentenced. Upon the filing of exceptions by the respondent, execution was suspended.

In his opening statement to the jury the State's attorney said, in substance, that after performing the operation, the respondent left Miss Gunderson without any advice to go out in the world; that such was the tendency of the State's evidence on a former trial. Exceptions being taken the court ruled these statements out as absolutely immaterial and counsel for the State unreservedly withdrew them. Nevertheless the respondent relies upon his exceptions. If evidence of the sort indicated would have been inadmissible, the statements were so treated by the court and

counsel as to render them harmless. But as bearing upon the question of whether or not the respondent, if he had performed an abortion, had performed an innocent act to save life, his leaving this young girl of eighteen to go out into the world without advice, if he did so, would have been a circumstance to be considered. The exceptions to the opening statement were without merit.

The evidence tended to show that Miss Gunderson's home was in Bridgeport, Connecticut; that finding herself pregnant, she, with a Miss Hayes, came to St. Johnsbury in this State, where the home of Miss Hayes was; that having learned of the respondent and received instructions as to where to find him, she and Miss Hayes betook themselves to his home in West Burke; that Miss Gunderson took along by way of introduction the business card of a Mr. Fifield of St. Johnsbury, a card which she handed to the respondent and left with him; that after seeing the card and hearing what Miss Gunderson had to say, the respondent performed the operation in question in the presence of Miss Hayes.

Mr. Fifield was a witness for the State, and after he had testified as to his business card, he was asked what was said on it. Objection being made in behalf of the respondent that the card was the best evidence, and the court having sustained the objection, counsel for the State said: "Well, as the evidence stands, the card was delivered over to the respondent, Bolton, so we ask him to produce the card." The respondent's counsel asked for an exception. The court said: "An exception to what," and upon being told that the State's counsel had asked for the production of the card, and that an exception was taken to the demand upon the respondent for the production of the card, the court allowed the exception. Thereupon the counsel for the State "waived" his request, and the respondent's counsel insisted upon his exception notwithstanding the so-called "waiver."

When the counsel for the State said he waived his request for the production of the card, he in effect withdrew it, and the jury had no occasion to understand that the respondent was put in the position of refusing to produce what the State had a right to demand. Although a technical waiver is in law the intentional relinquishment of a known right, that is, a right known to the person who makes the waiver, it is unreasonable to suppose that the colloquial language used by the State's attorney meant

to the jury or any one else anything more than that the request was withdrawn. And as it was withdrawn promptly no prejudicial error resulted.

The cases particularly relied on by the respondent are not much in point. One of these cases is *McKnight v. United States*, 115 Fed. 972, 54 C. C. A. 358. There by direction or suggestion of the court the district attorney demanded of the respondent the production of a highly incriminating document, and the court persisted through a long colloquy with the respondent's counsel that such course was proper. Error was found by the Circuit Court of Appeals. Another case relied on by the respondent is *State v. Merkley*, 74 Iowa 695, 39 N. W. 111. In that case the court itself questioned respondents, who had not offered themselves as witnesses, as to their knowledge of the whereabouts of certain paper, and this course was taken against objection and exception by the respondents. *Gillepsie v. State*, 5 Okl. Cr. 546, 115 Pac. 620, 35 L. R. A. (N. S.) 1171, Ann. Cas. 1912 D, 259, is another case somewhat relied on by the respondent in his brief. There the court against the objection of the appellant deliberately permitted counsel for the State to demand of the appellant certain letters. The demand was once or twice withdrawn for the purpose of reframing it, and when counsel finally got it in the shape he wanted it in, the trial court ruled against the demand solely for the reason that the letters had not been shown "to have any connection with the facts in the case on trial," when, as the Supreme Court of Oklahoma shows, they were by unmistakable inference material.

In the case at bar the request for the production of Mr. Fifield's card was so promptly withdrawn that it would be unfair to say that the respondent was put in the position of refusing to produce it or admitting that he had it.

In this case the court charged the jury that the respondent by his plea of not guilty put in issue every material fact; that by the rule of law in criminal cases, which the court correctly laid down, the State must establish its case, or the respondent must be acquitted; that the jury were not to try the case upon something that had not appeared, but upon the evidence which they had heard in court. The court then said: "Most of the evidence introduced on the part of the State is unexplained except by the circumstances which have been called to your attention in argument, for the respondent has not seen fit to go upon

the stand and testify in his own behalf. The fact that he has not testified is not to be taken against him, because he is not bound to go upon the stand as a witness and testify. He has a right to stand upon his denial and the presumption of innocence."

The respondent excepted to the part of the charge above quoted, and particularly to that portion of the quotation which reads: "Most of the evidence introduced on behalf of the State is unexplained except by the circumstances which have been called to your attention in argument, for the respondent has not seen fit to go upon the stand and testify as a witness in his own behalf." Taking this passage by itself, and construing it according to the rules of grammar, the use of the word "for" was objectionable. But we are to consider together all that the court said in determining whether error was committed. In *State v. O'Grady*, 65 Vt. 66, 25 Atl. 905, the court in its charge said: "The evidence of the state is uncontradicted by any evidence on the part of the respondent. The respondent has not testified. The mere fact that he has not testified is not to be taken against him. You have no right to consider that fact, but you have a right to consider the fact that the evidence introduced by the state has not been contradicted only so far as it may be contradicted in and of itself." In that instruction the word "mere" was fully as objectionable as the word "for" in the instruction under consideration. But the instruction in the *O'Grady* case, considered as a whole, was held to be free from error. The respondent undertakes to distinguish the instruction in the *O'Grady* case from the instruction here, because the court there told the jury that they had no right to consider the fact that respondent had not testified. But to say that, and to say, as was said here, that the fact that the respondent had not testified was not to be taken against him, are equivalent in meaning and force.

In *State v. Cameron*, 40 Vt. 555, the court was requested to charge the jury that the fact that the respondent had not taken the stand as a witness in his own behalf was not even to be thought of or taken into consideration by the jury to the prejudice of the respondent. This request the court refused saying he could not prevent their thoughts, but charging "that the fact of the respondent's not taking the witness stand should not be taken against him, the law only giving him the privilege of choice; and if the respondent did not choose to testify, it must

not be taken against him." This Court, Judge Steele writing the opinion, found no error in this instruction taken as a whole, though the remark, that the trial court could not control the thoughts of the jury, was disapproved of.

Our constitutional provision in point is that no person can in a criminal prosecution be compelled to give evidence against himself; and our statutory provision is that a person charged with crime shall be a competent witness at his own request, and not otherwise, and that his refusal to testify shall not be considered as evidence against him. Neither the constitutional nor the statutory provision was infringed by the charge of the court.

The respondent requested the court to charge as follows: "In this case the respondent is to be treated as though his mouth was closed by the law, and you are not at liberty to infer anything from his silence. It is your duty rather to respect your oath and to try this accusation solely upon the evidence which is placed before you." The respondent excepted to the failure of the court to comply with this request.

In the course of its charge the court, as we have seen, told the jury that they were to determine the case upon the evidence which they had heard in court and not upon something that had not appeared, and that the fact that the respondent had not testified was not to be taken against him. There was no occasion for telling the jurors that it was their duty to respect their oath. Such a practice, once begun, would cheapen the oath itself.

So the only part of this request for consideration is the claim that the court should have said to the jury: "In this case the respondent is to be treated as though his mouth was closed by the law." In *State v. Cameron*, 40 Vt. 555, this Court found no error in a charge which said that the law gave the respondent the privilege of choice, and that if the respondent did not choose to testify that fact must not be taken against him. This interpretation of the statute does not call for a charge that the respondent's mouth is closed by the law, and in fact it is not, for the statute permits him to open it if he chooses. The very claim which the respondent makes here was ruled against in *People v. Enright*, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913 E, 318. Other cases in point are *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750, where *State v. Cameron* is alluded to, and *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95.

Other exceptions noticed little if at all in oral argument, are

briefed, and can best be considered after a general outline of the case has been made.

The testimony on the part of the State tended strongly to show that an operation to effect a miscarriage, not necessary to save life, was procured by the use of some instrument.

The testimony of Mr. Fifield was to the effect that on the morning of June 17, 1916, he was seated near Miss Gunderson and Miss Hayes in a car from which they got off at West Burke, and that on the train Miss Gunderson told him she was going to West Burke to the respondent, Dr. Bolton, to have an operation performed for pregnancy; that Miss Hayes spoke for and in the presence of Miss Gunderson. Mr. Fifield's testimony was to the effect that he ran an employment agency at St. Johnsbury and had got to know Miss Gunderson somewhat in consequence of her coming to his office, in company with Miss Hayes, for the purpose of securing situations, and that he had known the respondent, Dr. Bolton, more or less, for several years.

The testimony of Miss Gunderson and Miss Hayes was directly to the point that they left the train referred to, at the time referred to, at West Burke, and went to the house of the respondent where the operation was performed by the respondent in the course of an hour or so after they left the train.

The testimony of Dr. Downing, a practicing physician, of Littleton, N. H., was that nine days later, that is, June 26, 1916, Miss Gunderson called at his office in Littleton in the afternoon; that he found her with an abortion partly completed; that in the evening of the same day he was called to her room, in a block at Littleton, where he found her worse than in the afternoon; that he saw her early the next morning, found her in a very sick condition and took her to a hospital where she was delivered of a foetus and afterbirth. He testified that beyond any doubt the abortion was caused by some instrument passed in from the outside. Dr. Downing, as he testified, notified the sheriff of Littleton, and also called in two other doctors. One of the physicians so called in was Dr. Page, a practicing physician of Littleton, who was a witness. The testimony of the physicians, Doctors Downing and Page, tended to make it probable that an instrument had been used at least a week before the delivery of the foetus.

W. H. Worthen, sheriff of Caledonia County, testified that on July 5 or 6, 1916, some eight or ten days after Miss Gunder-

son fell into the hands of Dr. Downing and was taken to a hospital, the respondent, Dr. Bolton, was arrested on the charge here, and that after the preliminary hearing in that regard was closed, after the respondent had waived examination and been held for trial, the respondent, Dr. Bolton, told Mr. Worthen that Miss Gunderson came to his house, with another young woman, that she had a card from Mr. Fifield that she gave him, that he read it, that he was a friend of Mr. Fifield, and performed an operation on the girl, that he helped her out by performing an operation.

Dr. Fitch of St. Johnsbury testified in behalf of the respondent that sometime in June, 1916, Miss Hayes and another young woman, that his testimony and other evidence slightly tended to show was Miss Gunderson, came to his office; that this other woman told him that she was pregnant, and wanted to know if he could do something for her, saying in substance, that she wasn't able to help herself, that he replied to the effect that abortion wasn't in his line of business, whereupon Miss Hayes and her companion went away. The evidence tended to impeach both Miss Hayes and Miss Gunderson as witnesses, and as the foundation for it had been laid, it could not well be objected to by the State's attorney. The respondent however, claims that the statement of the person whom we will treat as Miss Gunderson, that she wasn't able to help herself, was evidence from which an inference could be drawn that Miss Gunderson had in fact tried to cause an abortion, but had found herself unable to do so. In speaking of this testimony of Dr. Fitch, the court told the jury that it bore upon the credibility of Miss Hayes and Miss Gunderson, but that whatever they may have done with respect to procuring the miscarriage would not relieve the respondent if he assisted in procuring it as the evidence on the part of the State tended to show.

The respondent excepted to the charge of the court as to the testimony of Dr. Fitch on the ground that the court limited its effect to its bearing upon the credibility of the testimony of Miss Gunderson and Miss Hayes. If we so treat the charge, the limitation was proper, for neither of these women was a party, and since the evidence was admissible and so not open to just objection, it was not too late for the court to point out to the jury its legitimate use.

The respondent's brief says that the testimony of Dr. Fitch

might perhaps have been limited to its impeaching effect, if it had been objected to for any purpose except that of impeachment; but the respondent's counsel contends that as this evidence came in, it was in the case as evidence in chief for what it was worth for all purposes. The principle invoked has frequently been recognized in the case of inadmissible evidence received without objection, but whether it applies in the case of evidence admissible for one purpose and not expressly limited at the time of admission we do not need to inquire. For if it is taken as true that Miss Gunderson tried to commit an abortion and found she could not, and so started out to find a doctor who would perform the operation, those facts would have no tendency to show that she did not find Dr. Bolton and have performed on her by him. the operation which the evidence tended to show.

The respondent requested cautionary instructions as to the matter of admissions by the respondent, the words used, the duty of the jury to reconcile the words used with his innocence, if they could be so reconciled; their duty, if they found that the respondent admitted that he performed an operation to find if they could consistently with all the other evidence in the case, that whatever he did was something that he had a right to do. The requests in this regard were complied with to the satisfaction of the respondent.

In explaining the case, on the theory of these requests, the court told the jury that as to whether the operation was necessary to save life, they were to take into consideration the testimony of Miss Hayes and Miss Gunderson and the doctors at the hospital in determining whether what "he" did do was done with the intention of procuring an abortion or whether it was done to preserve her life. The respondent excepted to this instruction, "in the connection in which it was given," on the ground that the circumstances and conditions testified to by the doctors from New Hampshire had just as much and just as likely a bearing on any other operation of the same kind as on the operation that the respondent was claimed to have performed. However, the court submitted the testimony of the New Hampshire doctors in connection with testimony of Miss Hayes and Miss Gunderson, and the charge as to the circumstances which the whole testimony tended to show was not erroneous. The connection in which the instruction complained of was given was appropriate and the real ground of the exception falls out.

As to whether the respondent did, in fact, perform an operation to procure an abortion, or whether, if such an operation was performed by any one, it was performed by Miss Gunderson herself, or by some other person than the respondent, the charge was all that the respondent was entitled to.

The respondent made a lengthy request, the principal feature of which was that the only testimony that the respondent was the person who inserted the instrument, said to have caused the miscarriage, was that of Miss Gunderson herself, and that she was not corroborated on that point. However, she was so directly corroborated on that point by Miss Hayes, that there is no occasion for discussing the matter. The court omitted to give the requested instruction and could not have done otherwise.

The respondent requested an instruction that unless the jury felt that the testimony of Miss Gunderson was sufficient to establish the essential facts to which she testified the verdict must be for the respondent. The argument here is that on the question of whether the respondent did the acts which caused Miss Gunderson to have a miscarriage her testimony stood absolutely alone. But the claim of the respondent's counsel as to the evidence was and is a mistaken one, and the court rightly omitted to give the instruction.

Judgment that there is no error in the proceedings and that the respondent take nothing by his exceptions. Let execution be done.

RAYMOND WHEELER'S GUARDIAN v. MARTIN C. WHEELER.

February Term, 1917.

Present: WATSON, C. J., HASKELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 8, 1917.

Wills—Protection of Estate in Remainder—Probate Courts—Jurisdiction—Chancery—Sufficiency of Bill of Complaint—Demurrer—Discretion of Court—Cross Bill—Multifariousness.

Where a remainder man under a will, under which no executor has been appointed, desires to protect his interest in the estate from waste committed by the life tenant in possession, his speedy and regular course is to apply to the probate court for the appointment of the executor, who has ample power to protect the estate and the interest of all therein; and a bill in chancery brought for this purpose by the remainder man, against the life tenant is in derogation of the probate system of this State, and necessitates by indirection a construction of the will, and so is bad on demurrer.

A bill in chancery brought by a legatee under a will for the purpose of protecting his rights in the estate, which does not set out the refusal or neglect of the executor or administrator to act in the matter, will be dismissed.

It is within the discretion of the court, to entertain a demurrer to a bill in chancery, incorporated in an amended answer, but not contained in the original answer, there having been meanwhile no hearing on the merits.

A cross bill seeking the specific performance of a contract, the enforcement of a trust, and the construction of a will, is multifarious, and is properly dismissed on demurrer.

APPEAL IN CHANCERY. Heard on demurrers to the bill and cross bill in vacation after the March Term, 1916, Washington County, *Butler*, Chancellor. Decree sustaining both demurrers, and dismissing both bill and cross bill. Both parties appealed. The opinion states the case.

Theirault & Hunt for plaintiff.

Gleason & Willcox for defendant.

HASELTON, J. This is a proceeding in chancery. The hearing was on a demurrer to the bill, and on a demurrer to a cross bill. Both demurrers were sustained and the bill and cross bill were dismissed. Both parties appealed. The bill sets out the probated will of one Aaron C. Wheeler, deceased, the material part of which reads as follows:

"I give to my son Martin C. Wheeler the sum of five dollars —also the use of my entire property, both personal and real, till such time as his son, Harry M. Wheeler, becomes twenty-one years of age; at such time said Harry M. shall come into possession in full of one-half of my estate and my son Martin C. shall still continue to have the use of the other half and at said Martin C.'s decease his share of my estate shall go to Harry M. or his heirs, provided that if Martin C. shall have other heirs at his decease then this half of my estate shall descend to such heirs as provided by the laws of this State in such cases. If at any time it becomes evident to the executor of my will that the income as above provided is insufficient for Martin C.'s support and comfort then my executor may use such portion of the principal as he may deem necessary."

The bill sets out the death of Harry M. Wheeler, son of the defendant Martin C. and grandson of the testator and the birth to the defendant of another son, Raymond Wheeler, who is living, and of whom the plaintiff is mother and duly appointed guardian.

The bill further sets out that while the will has been probated, nothing has been done in the administration of the estate of Aaron Wheeler, or in the execution of his will, that in fact no executor has been appointed. The plaintiff does not ask for a construction of the will, but sets out that her ward, Raymond, has an interest in the estate left by the testator, and complains of the testator's son, Martin C., whose interest in the estate appears from the will, as for waste, and prays for an injunction against him, and a discovery and accounting by him. But her speedy and regular course under our statutes, is to apply to the probate court for the appointment of an executor of the will of Aaron Wheeler, for such an executor has ample power to protect the estate and the interests of all therein, and the proceedings here instituted are in derogation of our probate system, the integrity of which is carefully guarded.

The plaintiff's averment that no executor has been appointed

by the probate court is in effect an admission that she has taken no steps in that direction, and she stands in the position of asking the court of chancery to supplant rather than to aid the probate court.

With her course there free and unobstructed, she turns her back on that court and asks the court of chancery to proceed in aid of the court which she declines to set in motion. In such circumstances she cannot invoke the doctrine of aider.

Her ward is not an heir of Aaron, and claims only an interest as legatee, though the bill makes no claim as to what that interest is, and the bill is not brought for the construction of the will under the provisions of P. S. 2755. The will stands for construction by the probate court. To entertain the bill would be to ignore principles well settled in this State. *Mitchell et al. v. Blanchard*, 72 Vt. 85, 47 Atl. 98; *Blair v. Johnson*, 64 Vt. 598, 24 Atl. 764. If an executor or administrator finds an injunction to be required it is for him to apply for it.

The refusal or neglect of an executor or administrator to protect an estate, and doubtless other reasons, may afford a legatee ground for individual action directed to an individual end. But the bill sets out no occasion for such action on the part of the legatee here whose guardian brings the bill. The present proceeding if maintained would necessitate by indirection a construction of the will, and is not to be entertained, when a clear course initiated by action in the probate court, and contemplated by our statutes, remains open and unimpeded. The demurrer to the bill was properly sustained.

The demurrer to the bill was incorporated in an amended answer filed a few days after the original answer, and the plaintiff claims that, as the demurrer was not incorporated in the original answer, it was waived, and that the court had no power to entertain it. But as there had in the meantime been no hearing on the merits, the course taken by the court was permissible in its discretion.

The defendant's cross bill sets out that the original bill was filed against him October 25, 1915, and that thereafter, May 31, 1916, one Mark P. Ladd was duly appointed administrator with the will annexed of Aaron P. Wheeler, and such administrator is brought in as a party to the cross bill. The defendant in the original bill, plaintiff in the cross bill and hereinafter called the plaintiff, then proceeds to allege that in 1882 he made a contract

with his father, Aaron, by which the latter agreed to give a half interest in all his property to the plaintiff, and the plaintiff undertook to remain on the real estate, assist in paying off indebtedness and managing the property so long as his father should live, and that the plaintiff on his part fully performed. The plaintiff also sets out that his father after 1882, purchased certain parcels of real estate, taking the title in his own name, but holding the property in trust for the use and benefit of both, each having contributed to the payment therefor.

The cross bill seeks specific performance of the alleged contract, and also execution of the trust, as claimed through a conveyance by the administrator to the plaintiff. The cross bill also seeks a construction of the will, and a determination by the court of chancery of the question whether the son, Raymond, has any interest in the estate left by Aaron. The original bill related to the estate left by Aaron Wheeler, whatever that estate was, and the allegations in the cross bill as to a contract and trust affect only the size of the estate left by Aaron, and are not germane to the original bill. Besides, the cross bill is conspicuously multifarious. The specific enforcement of the alleged contract and the enforcement of the alleged trust, on the one hand, and the construction of the will on the other, rest on no common ground.

Neither the bill nor the cross bill is such proceeding for the construction of a will by the court of chancery as is contemplated by our statute in that regard. P. S. 2755. The court of chancery was right in sustaining both demurrers and in dismissing both the original bill and the cross bill.

Decree affirmed and cause remanded.

LUDLOW SAVINGS BANK AND TRUST COMPANY v. CHARLES H. KNIGHT, PATRICK L. STUART AND ANNA H. STUART, TRUSTEES

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 12, 1917.

Trustee Process—P. S. 1723—"Goods, Effects or Credits"—Fraudulent Conveyances—Consideration—Intent—Future Support.

Real estate is not included in the enumeration of "goods, effects or credits," the possession of which a person may be adjudged, a trustee, under P. S. 1723.

A conveyance of property without valuable consideration is fraudulent in law as to existing creditors of the grantor, for whom no ample provision has been made, and the good faith of the grantee is in such case immaterial; but, speaking generally, to make a conveyance for valuable consideration fraudulent, there must be a fraudulent intent both on the part of the grantor and the grantee.

In general, a transfer of property in consideration of future support is invalid as to creditors of the grantor, unless he retains property ample for the payment of his debts.

Defendant assigned certain property, including a promissory note, payable to himself, in consideration of his future support, without reserving sufficient to pay his debts. The assignees surrendered the note, receiving therefor part cash and a new note running to themselves. In an action brought against defendant by a creditor, *held*, the assignees of the note were chargeable as trustees under P. S. 1723, and, as they had received from the income of real estate transferred to them by defendant a sum greater than their expenditures for defendant's support, there was no occasion for considering such expenditures as affecting the amount for which they were chargeable.

Church v. Chapin, 35 Vt. 223, and *Smith v. Wiley*, 41 Vt. 19, approved.

ASSUMPSIT. Heard on the report of a commissioner upon the disclosure of the trustees and the trustees' exceptions thereto in vacation after the December Term, 1916, Windsor County, *Waterman, J.*, presiding. Judgment that the trustees were chargeable and overruling their exceptions to the report. The trustees excepted. The opinion states the case.

wanting in good faith as to creditors, and the character of the transaction is such as to put the grantee or vendee upon inquiry. Bigelow, *Fraudulent Conveyances*, 548.

But the trustees contend in argument that they cannot be held chargeable on account of the note turned out to them by the defendant, that treating the assignment of the note as void as to the creditor bank, its remedy, so far as the note is concerned, is against the Leslies, the makers of the note, who, and not the Stuarts, are indebted to the principal defendant thereon. But the trustees, the Stuarts, realized on the note turned out to them, by surrendering it and taking therefor, in part money, and in part a well secured note, running to themselves. To such a situation the case of *Smith v. Wiley*, 41 Vt. 19, is applicable. The argument for the trustees there was substantially that made for the trustees here. But there Judge Barrett, who tried the case in county court, held the trustees liable both for money received and notes taken as their own, and this Court, in an opinion by Chief Justice Pierpoint, affirmed the judgment, saying, after a reference to the commissioner's report: "The fact being established that the trustee has taken those notes, and appropriated them to himself, and converted them to his own use, he must stand in respect to them and the principal debtor, in the same position that he would if he had actually received the money upon them." We are satisfied with this decision and it applies here.

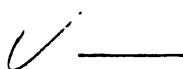
In converting to their own use the notes turned out to them by Knight, the trustees held the proceeds of the transaction, to answer the claims of the existing creditors, disenthralled of the provisions as to times of payment in the original notes or in the notes which they chose to take in accomplishing the conversion.

It appears that the trustees had paid out about \$150 for the maintenance of Knight during a period of some months, but it also appears that they had received more than that amount in rentals from the real estate conveyed to them in consideration of Knight's support, and so there is no occasion for considering such expenditures as affecting the amount for which the trustees are chargeable under P. S. 1723.

The trustees excepted to the findings of the commissioner as to the value of the property reserved by Knight, on the ground that the findings were not warranted by the facts reported, nor by the evidence which is referred to. But it is enough to say in

this regard that the exception is ill grounded. Some evidence bearing on these findings was received under objection and exception, but so far as any such exception is relied on, it is clear that the evidence was of inferential value, in connection with other evidence.

Judgment affirmed.



IN RE ABEL G. BUGBEE'S WILL.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 19, 1917.

Witnesses—Competency of Party When Other Party is Dead—Evidence—Declarations Against Interest by Deceased Persons—Findings of Fact—Sufficiency—Transcript—Inferences—Advancement—Change to Absolute Gift—Burden of Proof—Right of Testator to Make or Change Advancement—Parol Evidence Rule—Wills—Intention—Ademption of Legacies—Identification of Property Bequeathed—Time as of which Will Speaks.

Under P. S. 1589, as amended by No. 64, Acts 1908, and P. S. 1590, a party to a contract or cause of action in issue and on trial, the other party to which is dead, is competent to testify not alone to meet and explain the testimony of a living witness produced against him, but also any legitimate influence deducible therefrom.

In a hearing on an appeal from probate court upon a decree of distribution, where the executor testified to finding among testator's papers a receipt signed by a legatee, since deceased, to the effect that certain shares of corporate stock delivered to her by testator, during his lifetime, should be considered as an advancement, and also to circumstances indicating that the testator had not relinquished his right to have the stock reckoned as an advancement, the daughter of the deceased legatee was a competent witness to meet and explain this evidence, by testifying to a conversation with

testator, wherein he said that her mother was to share in the estate, and referred to the gift of the stock as a perfected gift.

The declarations of deceased persons against their interest or right are admissible in evidence against those who claim in their interest or right.

Upon the issue whether certain bank stock had been given by a testator to witness' mother an offer to show that the testator, in his lifetime, told the witness that he wanted some member of his family to know something about his property, that his estate had increased in late years, and the witness' mother was to share in such increase, that the increase was as much or more than certain bank stock he had given to his wife and witness' mother, and that he referred to such gift as a perfected gift, tested by the rule that any fact or circumstance is relevant which tends to show that a fact in issue is more or less probable, is not vitiated by irrelevant matter.

It is not reversible error for the trial court to fail to state in its findings the effect given to every subordinate fact in arriving at the ultimate fact or facts on which the judgment is based.

It is permissible only for the trial court to make the transcript of evidence a part of its findings of fact, and controlling, in order that the evidence may be examined in Supreme Court to see whether the court erred in finding or refusing to find certain facts, but not as an attempt to submit the determination of questions of fact to the Supreme Court.

The action of the trial court in failing to draw an inference from the circumstances appearing in evidence before it is not reversible error, when the circumstances do not compel but one inference.

In a hearing before the probate court upon a decree of distribution, the burden of proving that the testator during his life time changed an advancement into an absolute gift is upon the beneficiary under the will who claims that her share of the estate should not be extinguished thereby.

The right to have property delivered by a testator during his lifetime to a legatee reckoned as an advancement, is the right of the testator and not that of those who may prove to be the beneficiaries under the will; and he may discharge the right in the same way that he may relinquish any other right which pertains to him personally.

Evidence which goes only to the binding force of a written instrument does not infringe the parol evidence rule.

A will provided that if in the testator's lifetime, he should satisfy any bequest and take a receipt from the legatee stating that the same was an advancement, it should so be considered in the settlement of his estate. Testator, during his lifetime, delivered to a legatee certain shares of corporate stock, and took a receipt stating that the delivery thereof was an advancement. *Held*, the retention of such receipt by testator was not conclusive evidence of an advancement, but relevant and competent evidence of testator's intention to change the advancement to an absolute gift was admissible.

The rule that a legacy is adeemed by a delivery of the property to the legatee by the testator during his lifetime applies only when the will indicates the testator's intention that the property is to be enjoyed in specie in its existing state, and of necessity, there must be something to identify the property bequeathed with that subsequently delivered.

It cannot be said, as a matter of law, that a legacy of a certain number of shares of bank stock was adeemed by the delivery of an equal number of shares of the stock by the testator during his lifetime, to the legatee, when the testator, at the time of the bequest, possessed more shares of the stock than were specified in the various bequests in the will, and when there was nothing in the will to identify the stock bequeathed with that subsequently delivered.

A will speaks as of the time of the testator's death.

APPEAL from a decree of distribution made by the probate court for the District of Orleans. Trial by court, upon an agreed statement of facts and oral testimony, at the September Term, 1916, Orleans County, *Stanton, J.*, presiding. Judgment, affirming the decree of the probate court. Appellants excepted. The opinion states the case.

Dunnett & Shields for appellants.

F. E. Alfred and *J. W. Redmond* for appellees.

TAYLOR, J. This is an appeal from the decree of distribution under the will of Abel G. Bugbee, who died at Derby in this State on January 20, 1914. The appellants are daughters of the testator's only sister, Susan B. Blanchard. The case was tried by the court on an agreed statement of facts supplemented by oral evidence. The appellants bring the case here on exceptions

to the exclusion of evidence, to the refusal of the court to find in accordance with certain requests and to the judgment on the facts agreed and found.

The following facts appear from the agreed statement:

By the fourth paragraph of his will executed August 22, 1900, as altered by a codicil executed October 1, 1903, the testator gave his sister the use and income during her natural life of fifty shares of the capital stock of the Eastern Townships Bank with remainder over to his nieces, the appellants. The said Susan B. Blanchard survived the testator and died testate at Normal in the State of Illinois, May 26, 1915. On December 3, 1903, testator delivered to the said Susan B. Blanchard fifty shares of the capital stock of the Eastern Townships Bank and took a receipt for the same signed by her and the appellants, by the terms of which it was agreed that said stock should be accounted as a payment of said legacy in the settlement of his estate. The will provided that if in the testator's lifetime he should satisfy any of the bequests and take a receipt from the legatee stating that the same was an advancement towards such bequest, that the same should be so considered and treated by his executors. At the time he delivered said stock testator also took an order, signed by the same persons as the receipt, directing the bank to pay him all dividends, interest, etc., that should accrue on said stock until January, 1906. By the delivery of said stock and the taking of the receipt and order the testator intended to and did make an advancement thereof under the terms of the will, and the said Susan B. Blanchard and the appellants then so understood. Said order was delivered by the testator to the Eastern Townships Bank and he received the dividends on account of said stock to and including those paid January 1, 1906. Said order has always been in the custody of the bank or its successor.

Under date of January 31, 1906, testator wrote his sister the following letter which was duly received by her: "I herein mail to you the document with the names crossed out that you gave me in December, 1903, that then being your share of my estate. Now you will share in the estate the same as you would if that had not ever been given, feeling that what you have got, and get at my decease shall remain in your name so long as you live, the income to be used for your liberal support so long as you live and then divided equally share and share alike to Irene M.

Blanchard and Mrs. Frederick J. Steuber." The letter contained no enclosure. The only papers pertaining to her interest in her brother's estate ever signed by the said Susan B. Blanchard were the receipt and order referred to above. Between the time the original will was made and the date of said letter there was a material increase in the value of testator's estate. At the time said codicil was executed testator owned more shares of Eastern Townships Bank stock than the number specifically mentioned in the will. On March 1, 1912, the Eastern Townships Bank was consolidated with the Canadian Bank of Commerce which purchased all the assets and assumed all the liabilities of the former, issuing as consideration for the purchase its own stock of the same par value as the stock of the Eastern Townships Bank. The testator surrendered his stock in the Eastern Townships Bank and received in exchange stock of the Bank of Commerce of equal par value. At the time of his death he was the owner of 164 shares of the capital stock of latter bank of the par value of \$100 per share. At the time the original will was executed testator owned the exact number of shares of corporate stock and the exact amount of bonds bequeathed in each particular instance.

The parties stipulated in the agreed statement that either party had the right to introduce at the hearing any pertinent and admissible evidence that did not change or contradict any of the facts therein agreed to. At the opening of the hearing the appellees called D. W. Davis, the executor, as a witness and showed by him among other things that he was formerly cashier, and at the time of the trial, president of the National Bank of Derby; that the testator had a safe deposit box in said bank from as early as 1886 to the time of his death; that he lived near the bank and frequently called there to examine the contents of the box—to take out or to put something into it; that on these occasions testator spent considerable time looking over the contents of the box; that after the testator's death witness found his valuable papers in this box and found none anywhere else; that among the papers in the box he found the receipt signed by Susan B. Blanchard and the appellants and another similar receipt signed by other parties; that only one receipt signed by Susan B. Blanchard and the appellants was found. The court made findings of fact in accordance with witness Davis' testimony.

For the purpose of meeting and explaining Davis' testimony

the appellants were admitted to testify to certain facts against objection as to their competency. On the strength of a letter shown to have been written by the testator to his sister and the testimony of the appellants received under exception the court found that at the time testator delivered the stock he requested and obtained two receipts which were alike in all particulars. Against the same objection and under exception Mrs. Steuber was permitted to testify as to the contents of a lost letter received by her mother from the testator early in February, 1906, explaining why he did not enclose the receipts in his letter of January 31, 1906, and stating that he would destroy them; "that it would be the same as if he sent them to us to destroy and she would share according to his will." Though requested, the court declined to find the contents of the letter to be as witness testified. For a like purpose the appellants offered to show by Mrs. Steuber that she visited the testator at his home in Derby in August, 1906; that while there he told her that he wanted some member of his family to know something about his property; that he showed her a book apparently containing an inventory of his stock and bonds; that he said she could see that his estate had increased a good deal in late years and that her mother was to share in that estate; that the increase was as much or more than the bank stock that he had given to her mother and his wife; and that he referred to the gift of the bank stock as a perfected gift. The offer was excluded to which appellants saved an exception.

The scope of the exception in the statute (P. S. 1590, as amended by No. 64, Acts of 1908) disqualifying a party to testify in his own favor when an executor or administrator is the other party was pointed out in *Gilfillan v. Gilfillan's Estate*, 90 Vt. 94, 100, 96 Atl. 704. It was there held that such party was competent to testify in his own favor to any fact or circumstance which tended to meet or explain the testimony of a living witness produced against him; in other words, to such affirmative facts as had a tendency to meet and destroy the effect of such testimony. If, as the appellees contend, the competency of the witness was affected by P. S. 1589, as amended by No. 64, Acts of 1908, because a party to the "contract or cause of action in issue and on trial," the same question is presented. The exceptions in favor of competency, so far as they are here material, are the same in both sections.

In considering the construction of the exception in question it is necessary to have in mind that P. S. 1589 and P. S. 1590 are themselves exceptions to the general rule of competency; that in their origin they were provisos of a statute having for its object the removal and not the creation of disqualifications. *Comstock's Adm'r v. Jacobs*, 89 Vt. 133, 140, 94 Atl. 497. Hence a construction should be given which inclines towards competency. We think the reasonable view of the exception is that it makes the living party competent to testify not alone to meet and explain the facts testified to by the witness but also any legitimate inference deducible therefrom. If the legislature had intended to restrict his testimony in the manner indicated, words of more restricted meaning would naturally have been employed. If the party were to be confined to rebutting the facts alone he would not enjoy the full benefit of the statute which makes him a competent witness to *meet* the testimony of the living witness produced against him. This is well illustrated in the case at bar. Davis' testimony was important only because of the inference sought to have drawn therefrom that the receipt was still operative and evidence that the testator had not changed the advancement into an absolute gift. The facts affording a basis of the inference could not be, at least were not, controverted. But facts existed, known only to the appellants, that tended to meet and destroy the effect of Davis' testimony.

The question of Mrs. Steuber's competency to testify to the facts detailed in the offer, therefore, depends upon their relevancy to the issues of fact raised by Davis' testimony and she was a competent witness so far as it was offered to show by her facts which would tend to rebut his testimony or the inferences to be drawn therefrom. *Gilfillan v. Gilfillan's Est.*, 90 Vt. 94, 102, 96 Atl. 704.

The question does not stand as it might if Davis had merely been called to produce the receipt. It might then have been argued with some force, if only so much was testified to by him as laid the foundation for receiving the receipt in evidence, that the case stood on the *prima facie* effect of the receipt as independent evidence and that the offered evidence did not tend to "meet and explain" his testimony. But he was improved as a witness for an entirely different purpose. On the agreed facts the production and identification of the receipt was unnecessary. It already appeared that such a receipt was signed and delivered

to the testator and that the transfer of the stock was then intended and understood by all the parties interested as an advancement under the will. Standing thus, the burden of showing that the testator had discharged his right to have the stock reckoned as an advancement was upon the appellants. This the testator's letter of January 31, 1906, set forth in the agreed statement of facts, strongly tended to show, if the "document" therein referred to was the receipt in question. To escape the effect of this letter Davis was called to testify, not alone to the finding of the receipt among the testator's valuable papers, but to circumstances indicating that it was still operative,—in other words, that the testator had not relinquished his right to have the stock reckoned as an advancement. We hold that Mrs. Steuber was a competent witness to give the offered evidence so far as it tended to rebut the inferences to be drawn from Davis' testimony.

The claim is made that the offer is vitiated by facts that were inadmissible in any view of the case and special stress is laid upon the part of the offer relating to testator's declarations. But the declarations of deceased persons against their interest or right are with us admissible against those who claim in their interest or right. *Wheeler v. Wheeler*, 47 Vt. 637; *Conn. River Sav. Bk. v. Albee*, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944; *Hopkins, Trustee v. Sargent's Est.*, 88 Vt. 217, 92 Atl. 14. See also *Redding v. Redding's Est.*, 69 Vt. 500, 38 Atl. 230; *Comstock's Adm'r v. Jacobs*, 86 Vt. 182, 84 Atl. 568.

The declaration here involved was against the testator's right and interest and so was admissible against the appellees who are claiming under him and in his right. Tested by the rule that any fact or circumstance is relevant which tends to show that a fact in issue is more or less probable the offer is not vitiated by irrelevant matter. The exception to the exclusion of the offered evidence will have to be sustained.

The appellants made numerous requests for specific findings and excepted to the failure of the court to comply therewith. As to several of the requests it is enough to say that if the facts called for are material they are only subordinate facts. It is not reversible error for the court to fail to state in its findings the effect given to every subordinate fact in arriving at the ultimate fact or facts on which the judgment is based. See *Allen's Adm'r v. Allen's Adm'rs*, 79 Vt. 173, 64 Atl. 1110. The practice of reviewing the whole evidence and classifying this

fact as found, or that fact as not found, would greatly extend the findings and ordinarily serve no good purpose.

The third request was for a finding in substance that by his letter of January 31, 1906, to his sister the testator intended to change the advancement into an absolute gift and that the "document" referred to was the receipt given for the advancement. Referring to this request the court states that it is unable to find what the document referred to was or that any document was mailed.

The transcript of the evidence is made part of the court's findings and controlling "as to any fact herein found or any request for finding herein denied." It is not quite clear what force the trial court intended thereby to give to the evidence; but it seems probable that it was intended to send the testimony up only that it might be examined to see whether the court erred in finding or refusing to find certain facts, rather than as an attempt to submit the determination of questions of fact to this Court, the former and not the latter course being alone permissible.

The testator's intention as to changing the advancement to an absolute gift was a question of fact and the evidence was conflicting. The letter indicated one intention, and the retention of the receipt another. His intention cannot be ascertained from the letter alone as a question of law despite the fact that the letter strongly indicates what that intention was. As to the document referred to, it was already agreed that none was sent; and while the fact that only one of two papers could have been referred to, one of which had from the first been out of the testator's control and was no longer of any force, strongly points to the receipt as the one intended, still the fact was one of inference for the trial court to draw, and beyond our control unless we can say that only one inference was possible. This we hesitate to do.

The substance of the sixth request was for a finding that the testator destroyed one receipt and thereby carried into effect the intention expressed in his letter of January 31, 1906, to permit his sister to share under the will the same as though no advancement had been made; and that the duplicate receipt was at that time either forgotten or overlooked. But of this there was no direct evidence and the fact if found must be inferred from the circumstances. It was for the trial court to draw the inference and as the circumstances did not compel but one inference, the

action of the court in denying the request was not reversible error.

The appellants excepted to the judgment affirming the decree of the probate court. So far as here material the decree was as follows: "As to the fourth bequest in said will said court doth find that the legacy of fifty shares of the capital stock of the Eastern Townships Bank to the said Susan B. Blanchard was fully satisfied in the lifetime of said testator by the delivery to said Susan B. Blanchard of the aforesaid shares of capital stock, as evidenced by the original receipt of the said Susan B. Blanchard and others."

In support of this exception it is urged that the evidence shows that the testator during his lifetime changed the advancement into an absolute gift. Conceding that their evidence strongly tended to indicate that fact, the fault with their position is that the burden was on them and the trial court has found against them. As we have already seen the evidence relied upon was not so clear and convincing that only a conclusion favorable to them could be drawn therefrom.

We come to the question whether the judgment can be sustained in spite of the error in excluding evidence. As bearing upon this question the appellees claim that the receipt itself was conclusive evidence of an advancement, made so by the terms of the will; and that the receipt is a contractual writing and so governed by the parol evidence rule. Early in the trial they interposed an objection raising the question of the relevancy of certain evidence offered to avoid the effect of the receipt. Whether the exception taken later covered this ground of objection does not clearly appear. The only finding based on such evidence was that when testator delivered the stock he requested and obtained duplicate receipts. As the same question would probably arise on a retrial, it seems advisable to treat the objection as not having been waived.

If the receipt is to be deemed a contract, that fact is not controlling of the question here. The contents of the writing and its original purpose and effect are not in issue. Appellees concede that the testator could change the advancement into an absolute gift notwithstanding the provision of the will. Their contention is that this could be accomplished only by the destruction or surrender of the receipt; that the will specifies the effect of the contingency that occurred when the receipt was taken;

and that to give effect to an intention to change the advancement into an absolute gift while retaining the receipt would be to change the will by an act of the testator *in pais*, which it is claimed is not permissible. The cases cited in support of this claim are to the effect that parol evidence would not be competent to show, contrary to the receipt, that an advancement had not originally been made. But our attention is directed to no case holding that such evidence would not be competent to show that the advancement had subsequently been converted into an absolute gift. That it would be competent to show by parol that the receipt had been surrendered or destroyed is shown by *Wheeler v. Wheeler's Est.*, 47 Vt. 637. The facts of that case required the court to go only so far, but the reasoning on which the decision is based goes further. It is clearly pointed out that a testator may remove an advancement from the operation of his will with the same freedom that he may dispose of his possessions in his lifetime. The right to have the property delivered reckoned as an advancement is his right and not that of those who may prove to be his beneficiaries under the will; and he may discharge the right in the same way that he may relinquish any other right which pertains to him personally. See *Harris v. Harris' Est.*, 82 Vt. 199, 210, 72 Atl. 912.

Appellants claimed that one of the duplicate receipts had been destroyed and their evidence tended to support the claim. It went to the binding force of the receipt and so did not infringe the parol evidence rule. *Webster v. Smith*, 72 Vt. 12, 47 Atl. 101; *Cameron v. Estabrooks*, 73 Vt. 73, 50 Atl. 638.

The ultimate question is, did the testator intend to discharge the right to have the delivery of the stock reckoned as an advancement? *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, 34. The destruction or surrender of the receipt would be strong evidence of such an intention; but can it be said that they afford the only evidence thereof? Let us assume that the testator had written his sister that he waived his right to have the stock treated as an advancement, but for some undisclosed reason retained possession of the receipt. Could it be said that the unexplained retention of the receipt was conclusive evidence of his intention in spite of his express waiver of its provisions? We think it clear that the receipt has no such conclusive effect and that its continued existence would not make it necessary to exclude other relevant and competent evidence of testator's intention to change the advance-

ment to an absolute gift. We are not now considering the weight to be given any particular evidence, a proper regard as to which will sufficiently protect the rights of the parties.

In this connection it is claimed that the bequest to Susan B. Blanchard was adeemed by the delivery of the stock. The argument is that the bequest was specific and as such was fully satisfied by the conceded transfer of the stock. The question turns on whether the bequest was in fact specific. The rule invoked applies only when the will indicates the testator's intention that the property is to be enjoyed in specie in its existing state. 2 Williams on Executors, 1039. Of necessity there must be something to identify the property bequeathed with that subsequently delivered. The appellees concede that a legacy is presumed to be general rather than specific and that the mere fact that a testator in gifts of stock gives exactly the amount of a particular stock he has in hand is not sufficient to overcome the presumption; but it is urged that the fact that the testator "had the exact amount of stocks and securities that he bequeathed," together with the other facts and circumstances recited, compels the inference that the bequest was specific. But their premise is faulty. The testator possessed more shares of stock of the Eastern Townships Bank at the time the bequest to his sister was made than the will specified. There is nothing in the will to identify the stock bequeathed with that subsequently delivered. The will speaks as of the time of the testator's death. For aught that appears he had left after the transfer to his sister enough of the stock, or the later substituted stock, to provide for all of his bequests, treating Mrs. Blanchard's legacy as not satisfied. Standing thus it cannot be said as a matter of law that her legacy was adeemed.

It follows that no tenable ground is advanced why the judgment should be sustained notwithstanding the error found, and the appellants are entitled to the benefit of their exception.

Judgment reversed and cause remanded.

STATE v. TERESA ROSSI.

January Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 9, 1918.

Witnesses—Cross-examination—Use of Papers to Refresh Recollection—Discretion of Court—Admissibility of Evidence not Excepted to—Presumption of Innocence—Weight as Evidence—Respondent's Refusal to Testify.

Where a witness, during his direct examination, has referred to certain papers for the purpose of refreshing his recollection, the cross-examiner is entitled to have such papers handed to him for purpose of cross-examination, but is not entitled to other papers, held in the witness' hand while testifying, but not referred to by him.

Where, in such circumstances, the cross-examiner did not know whether the papers handed to him were those referred to or not, the action of the court in ascertaining what papers were required, by inquiry from counsel and witness, and by examination of all the papers, and in giving him the use of such, was not error.

In a prosecution for the illegal sale of intoxicating liquor, it is within the discretion of the trial court to exclude a question asked on cross-examination of a State's witness, as to whether the witness had stated that he had a right to be, and had been, engaged in the selling of liquor.

The question of the admissibility of evidence, not excepted to in the court below, is not before the Supreme Court.

In a criminal prosecution, an instruction that the presumption of respondent's innocence is a piece of evidence to be considered and weighed by the jury, with other evidence, is all that the respondent is entitled to upon this point.

The presumption of innocence, in a criminal prosecution, is to be given such weight as evidence as the jury think it ought to have.

An instruction that respondent's refusal to testify should not be taken against him, with the explanation that respondent might testify or not as he choose, and that if he did not testify, the fact must not be taken against him, *held*, correct and not open to misconstruction.

INFORMATION for the illegal sale of intoxicating liquor. Plea, not guilty. Trial by jury at the Special May Term, 1917, Windsor County, *Waterman, J.*, presiding. Verdict, guilty. Respondent excepted. The opinion states the case.

Charles Batchelder for respondent.

W. S. Pingree, State's Attorney, for the State.

HASELTON, J. This was a prosecution for the illegal sale of intoxicating liquor.

One of the witnesses in behalf of the State was a detective, Balsar. During his direct examination he consulted certain papers to refresh his recollection. It appeared that when he referred to the papers mentioned, he held in his hand other papers to which the ones referred to were attached. On cross-examination the respondent's counsel called for all the papers which the witness had held in his hand when he was testifying. The court ruled that the respondent's counsel should have for the purpose of cross-examination all the papers that the witness had referred to, but that the respondent's counsel was not entitled to have the witness hand over the other papers. This ruling was correct and was not excepted to.

Three papers were thereupon handed over in accordance with the ruling. The respondent's counsel said he did not know whether the papers passed to him were the ones the witness had referred to or not, and claimed the right to have passed to him all the papers in the bundle referred to. The court ascertained as well as it could what papers the witness had referred to and ruled that at the time the respondent's counsel was not entitled to the other papers asked for. To this ruling an exception was taken, but it was ill-grounded. If in fact, while the witness had been testifying, the respondent had failed to have identified the papers referred to by the witness his failure in that respect did not entitle him to the use on cross-examination of any other papers in the possession of the witness. The respondent's counsel being in doubt through his own fault as to what papers the witness had used in open court to refresh his recollection, the court satisfied itself by inquiries of the witness and of the State's Attorney, and by an examination of all the papers talked about, what papers the witness had used on his direct examination and

gave the cross-examiner the use of such papers. The respondent had nothing to complain of.

The cross-examination of the witness, Balsar, was rather long. At the close of it the cross-examiner asked the witness if on or about a day named, while in the restaurant of a Mr. Jenne, in a conversation with Mr. Jenne, the witness stated to Mr. Jenne that the witness had a right to engage in and had been engaged in selling intoxicating liquor in Bethel. The court declined to take the answer to this question and it was within the discretion of the court to exclude it. Though the respondent took an exception to the ruling he does not argue this exception, and we refer to the matter only because the respondent refers to it in another connection.

After the State had rested the respondent called Fred C. Putnam, Deputy Sheriff, and after asking him a few questions about the witness Balsar, made a large number of offers to show by Putnam doings and sayings of Balsar. These the court excluded. In his brief the respondent argues that evidence under his offers was admissible. But he took no exception to the ruling of the court excluding such evidence and the question of its admissibility is not before us.

The respondent took an exception to the charge of the court on the subject of the presumption of innocence. A summary of the charge upon this matter is this: The court told the jury that there was a presumption of the innocence of the respondent, that this presumption was a piece of evidence to be taken into consideration and weighed along with the other evidence and to be given such weight as the jury thought it ought to have. The ground of the exception as argued on the charge as it was finally left is, in short, that thereunder the jury might wholly disregard the presumption or reduce its weight to next to nothing. The charge, however, was not faulty in the respect claimed by the respondent. All the respondent was entitled to he got when the court told the jury that the presumption was a piece of evidence to be considered and weighed by them together with the other evidence.

The respondent did not testify. As to that matter the court cautioned the jury that respondents need not testify unless they desire to, and that if they do not, their refusal to testify cannot be taken against them, that this respondent's refusal to testify should not be taken against him. The respondent excepted par-

ticularly to the use of the phrase "refusal to testify" which is the statutory phrase. Thereupon the court explained that under the law respondents may testify or not as they choose, but that if they do not testify that fact must not be taken against them. The charge upon the point under consideration taken as a whole was correct and not open to misconstruction. *State v. Bolton*, 92 Vt. 158, 102 Atl. 489; *State v. O'Grady*, 65 Vt. 66, 25 Atl. 905; *State v. Cameron*, 40 Vt. 555.

The exceptions taken and relied upon by the respondent have been considered.

Judgment that there is no error in the proceedings and that the respondent take nothing by his exceptions. Let execution be done.

STATE v. MARY CERESA.

January Term, 1918.

Present: WATSON, C. J., HASLTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 12, 1918.

Illegal Sales of Intoxicating Liquor—Evidence—Materiality.

In a prosecution for the illegal sale of intoxicating liquor, the testimony of a witness that he went to respondent's house with two other persons, and got some whiskey there, but did not know who brought it out, nor who called for it, and drank some of it with the others, was material, when taken in connection with other evidence, and tended to show that respondent was guilty as charged.

In a prosecution for the illegal sale of intoxicating liquor, the declaration of a detective employed by the State, but not called to testify, to the effect that, if he and the person to whom he was talking could not get liquor at respondent's house, they should go to another place, was properly excluded, as not being evidence against the State for any purpose.

In a prosecution for the illegal sale of intoxicating liquor, evidence offered by respondent, that a detective employed by the State, but

not called to testify, was himself engaged in the illegal traffic in intoxicating liquor, and was selling to the witnesses who testified against respondent, was wholly irrelevant, and was properly excluded.

INFORMATION for selling intoxicating liquor contrary to law. Plea, not guilty. Trial by jury at the Special Term of Windsor County Court, May, 1917, *Stanton, J.*, presiding. Verdict, guilty. Respondent excepted. The opinion states the case.

Charles Batchelder for respondent.

W. S. Pingree, State's Attorney, for the State.

WATSON, C. J. The respondent stands convicted of unlawfully selling intoxicating liquor at her house in Royalton.

The State called as a witness one Charles Christopher, a log driver on White River at the time the offence is found to have been committed, who testified that he and one George Lawrence went into the respondent's house one afternoon in May, 1917, for the purpose of getting some liquor, and that he got a quart of whiskey there, but did not know whether he got it of the respondent or not; that he paid for the liquor, but did not remember of paying her; that he saw the respondent there, but saw no one else there on that occasion except other lumbermen. He further testified to drinking liquor there in the respondent's kitchen, taking the liquor he drank from the quart. John Collins, another log driver called as a witness by the State, testified to being at the respondent's house and in the kitchen with Charles Christopher and George Lawrence on the same occasion; that besides those who went there with him, he saw there no one except the respondent and a little girl; that another man whom they called "Scott", (whose name was in fact Balsar,) went up as far as the yard, but did not go into the house; that the witness got some whiskey there that day, but did not know who brought the whiskey out; that he first saw it on the table, but it was not on the table when he first went into the kitchen; that he could not say who called for the whiskey, but he had two drinks of it,—he, Christopher, and Lawrence were all drinking together. There was no cross examination of this witness. At the close of his direct examination, the respondent moved that the testimony

given by the witness be stricken from the record, on the ground that it utterly failed to connect the respondent with any illegal sale charged in the information. To the overruling of the motion, an exception was saved. This ruling was without error. The testimony of this witness, when taken with that given by the witness Christopher, was material, and tended to show the respondent guilty as charged.

The respondent introduced evidence tending to show that Balsar, mentioned above, was engaged in detective work, resulting, to some extent, in this prosecution being commenced, and that at the time when the witnesses Christopher and Collins were at the respondent's house on the occasion concerning which they testified, Balsar was lying on the ground by the side of the road. The respondent's son, a lad of fourteen years, testified that while Balsar was lying there, one of the men came from the house and that the two had conversation together. The respondent then offered to show by the witness that such conversation was had between them that Balsar said, "Well, if you can't get any thing here let's get out of the way and go over to Faulkner's." The offered evidence was excluded and exception saved. Balsar was sworn as a witness, but was not called to testify. It is urged that the evidence for the State tended to show that Balsar let Christopher have a dollar before the latter went to the respondent's house, and therefore Balsar was financially and otherwise interested in the expedition, and further that the evidence tended to show, as claimed by the respondent, that no liquor was procured of her. As the case stood, the declaration was properly excluded. It was not evidence against the State for any purpose.

The respondent offered to show that Balsar was engaged in the illegal traffic in liquor himself, selling to the same men who testified against the respondent in this case. The evidence was excluded and exception noted. Such evidence was wholly irrelevant to any issue in this case, and was rightly excluded.

Judgment that there is no error in the proceedings, and that the respondent takes nothing by her exceptions. Let execution be done.

M. A. BUNDY v. W. SHELTON SWALLOW COMPANY, AND TRUSTEES.

October Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 12, 1918.

*Exceptions—When Without Basis—County Court Rule 31—
Motion for Further Examinations of Trustees after Judgment on Disclosure—Discretion of Court.*

An exception to a ruling that plaintiff was entitled to recover upon a contract for certain construction without having furnished bonds, is without even color of basis when the contract contains no such requirement.

An exception not noted by the court at the time of making the decision is unavailing, under County Court Rule 31.

A motion made by defendant for the further examination of trustees, after judgment has been rendered upon their disclosures, is in effect a motion to vacate the judgment against them and to hear further the questions involved therein, and is addressed to the discretion of the trial court; and when it does not appear that there was an abuse of the discretion as exercised, the decision overruling the motion will not be disturbed in Supreme Court.

CONTRACT. Heard by the presiding judge on a point of law arising on the assessment of damages by the clerk, and on the disclosure of the trustees, in vacation after the September Term, 1916, Chittenden County, *Waterman, J.*, presiding. Judgment affirming the assessment and holding the trustees liable on their disclosures. Defendant claimed an exception. The opinion states the case.

Max L. Powell for defendant.

Sherman R. Moulton for plaintiff.

WATSON, C. J. At the September Term, 1916, of Chittenden County court, judgment was entered for plaintiff by agreement of counsel, the clerk to assess damages. On the question of

assessment before the clerk, a point of law was raised by defendant as to whether the plaintiff was entitled to recover without showing that he had furnished bonds. This question was ruled against the contention of the defendant by the clerk, and by him referred to the court. The court sustained the ruling of the clerk in this respect. There is some doubt as to there being any available exception covering this question, but assuming that there is, the exception is without even color of basis, for the contract between the plaintiff and the defendant has no such requirement.

Judgment against the trustees on their written disclosure was rendered in vacation after the said September Term, the judgment order being filed March 20, 1917. No exception thereto was taken by the defendant until May 23, 1917, sixty-four days later. This exception was not noted by the court at the time of making the decision, and consequently is unavailing, under Rule 31, of the county courts.

The defendant moved the court for further examination of the trustees in accordance with sections 1687 and 1689 of the Public Statutes, and for an opportunity to be heard, claiming the right thus to examine the trustees; also claiming that the disclosure of the trustees was insufficient on which to base a judgment, and that at the time of the service of process upon the trustees, there was, according to the disclosure, nothing due the defendant from them. Defendant further claimed that an oral agreement was entered into between the counsel for the trustees and counsel for the plaintiff, whereby formal disclosure was waived, and counsel for the plaintiff accepted the oral disclosure of the trustees as made at that time, it being to the effect that there was sufficient amount in their hands to pay the plaintiff's claim. The written disclosure was filed later. The court refused to grant the motion and allowed the judgment and assessment to stand, granting defendant an exception. In effect the motion was to vacate the judgment against the trustees and to hear further the questions involved therein. This was addressed to the discretion of the court, and it not appearing that there was an abuse of the discretion as exercised, the decision overruling the motion will not be disturbed by this Court. *Mutual Life Ins. Co. v. Foster*, 88 Vt. 503, 93 Atl. 258.

Judgment affirmed.

CHARLES BARCLAY v. WETMORE & MORSE GRANITE CO.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed October 16, 1917.

Master and Servant—Duty of Inspection—Jury Question—Reliance by Servant—Duty to Warn and Instruct Servant—Contributory Negligence—Incompetency—Single Act of Negligence.

In an action of tort for negligence, the question whether it was the duty of defendant, after having made a blast in a granite quarry, to make a reasonable inspection, before ordering a second blast, was, under proper instruction by the court, for the jury.

Where it is the duty of the master to make an inspection, and a reasonable inspection is not made, the master is liable for injuries sustained by a servant by reason of the dangerous condition existing; or if by the inspection made, the master knew, or ought, in the exercise of due care, to have known of the dangerous condition, and the servant is injured thereby, not having knowledge of the danger equally with the master, the latter is liable.

Where the duty of inspection is on the master the servant is justified, in the absence of knowledge or information to the contrary, in assuming that the master has performed his duty fully in this regard, and relying upon it without inspection for himself.

A servant has the right to assume that the master will warn and save him from needless exposure to injury.

In an action for tort to recover for personal injuries, brought by a servant against his master, the negligence of the defendant and contributory negligence of the plaintiff, *held*, to be jury questions.

Incompetency and negligence are not convertible terms, for the most competent may sometimes be negligent, while incompetency goes to unreliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such persons in the general employment.

A single act of negligence on the part of a servant, unaccompanied by circumstances tending to show incompetency, is not in itself evi-

dence of incompetency, and it is error, under such circumstances, to submit the question of the servant's incompetency to the jury.

TORT FOR NEGLIGENCE. Plea, the general issue. Trial by jury at the September Term, 1916, Washington County, *Fish, J.*, presiding. Verdict for plaintiff. Defendant excepted.

The plaintiff was a powder man in the employ of the defendant. After exploding a blast in a sheet of granite, he was ordered by defendant's foreman to prepare and fire a "seam blast", in a seam in the stone which had been made by the first blast. There was evidence tending to show that it was the duty of the foreman to inspect the stone after the first blast to determine whether it was safe to fire the "seam blast." The foreman told plaintiff to hurry, and the latter prepared the blast, but, while preparing to fire it, the stone moved and the powder exploded, causing the injuries complained of.

At the close of plaintiff's evidence, the defendant rested its case and moved for a verdict, the grounds of which motion appear fully in the opinion.

In addition to the general verdict, the jury brought in a special verdict, in answer to a question submitted to them by the court, in which they found that the accident was the result of the incompetency of the foreman.

Erwin M. Harvey and Richard A. Hoar for defendant.

A single act of casual neglect by a servant does not show incompetency so as to charge the master with negligence in retaining the servant in his employ. *Bailey*, Personal Injuries, Sec. 340, pp. 897, 898; *Holland v. So. Pac. Co.*, 100 Cal. 240; *Baulac v. R. R. Co.*, 59 N. Y. 356; *Conrad v. Gray*, 109 Ala. 130; *Couch v. Coal Co.*, 46 Iowa 17; *Baltimore Elec. Co. v. Neal*, 65 Md. 431; *Harvey v. R. R. Co.*, 88 N. Y. 481; *Wicklund v. Sayles Coal Co.*, 119 Iowa 338; *Hathaway v. Ry. Co.*, 92 Iowa 340; *Cooper v. Ry. Co.*, 23 Wis. 668.

John W. Gordon and S. Hollister Jackson for plaintiff.

A single act of negligence may be sufficient to establish incompetency. *Mahoney's Admr. v. Rutland R. R. Co.*, 81 Vt. 210, 217; *Russ v. C. V. Ry. Co.*, 78 Vt. 424; *Place v. G. T. Ry. Co.*,

82 Vt. 42, 48; *Still v. San Francisco Ry. Co.*, 154 Cal. 559; *Murphy v. St. Louis, etc., R. R. Co.*, 71 Mo. 202; *Lee v. Michigan Cr. Co.*, 87 Mich. 574; *Pleasants v. R. R. Co.*, 121 N. C. 492; *Heath v. New Haven, etc., Co.*, 140 Mass. 175; *Evansville, etc., R. R. Co. v. Guyton*, 115 Ind. 450.

MILES, J. This is an action in tort to recover for a personal injury sustained by the plaintiff through the alleged negligence of the defendant in not furnishing the plaintiff with a safe place in which to perform his duties and in not furnishing him with a competent fellow servant. The case was tried by jury and at the close of the plaintiff's evidence both parties rested and the defendant moved for a directed verdict. The motion was overruled to which the defendant excepted, and without any testimony being offered on the part of the defendant, the case was argued and submitted to the jury who found for the plaintiff.

The evidence viewed most strongly in favor of the plaintiff in determining the questions raised by the motion, fairly and reasonably tended to show the following facts: The plaintiff, at the time of his injury, was fifty-seven years old and had been engaged in the quarry business since he was fourteen or fifteen years of age; that he had been a powder man engaged in handling powder and blasting rock in quarries for thirteen or fourteen years; that he had been at work for defendant for three or four years before the accident as a powder man and engaged almost exclusively in loading and firing blasts during that time; that he was well acquainted with the quarry business in all its details; that since he was employed by the defendant, his duties required him to do blasting wherever directed by any of the defendant's six foremen, and on the day of the accident he was ordered by Charles Lance, one of the defendant's foremen, to load and fire a blast in defendant's quarry.

No question is made but that when the plaintiff was first ordered by Lance to load and fire the blast, the place in which he had to work was reasonably safe, and it so remained during the making of that blast. By that blast the stone was separated from the quarry to some extent, leaving a seam between the solid wall and the stone intended to be removed. After the blast was fired, Lance and another foreman went to the place of the blast, the plaintiff following them. Lance examined the result of the blast and then ordered the plaintiff to make a seam blast,

and to hurry up about it as the men were waiting for him. Thus the foreman inspected the situation, and on such inspection gave the order to make the blast, without which order the plaintiff would not have made it, as he had performed his duties resting upon the first order given him. Can it be said as matter of law that the duty of such inspection did not devolve upon the master after the first blast, and before ordering the second one? Or was it, in the circumstances of this case, a question of fact for the jury? Bearing in mind the exact scope of the plaintiff's duties generally, and also of the first order to him to make the blast in this part of the quarry, we think it was a question of fact for the jury whether, under proper instruction by the court, it did not devolve upon the defendant to make a reasonable inspection of the situation before ordering the second blast. This being so, if reasonable inspection was not made, which was also a question for the jury, the master is liable; or if by the inspection made, the master knew, or in the exercise of due care ought to have known of the dangerous condition existing, and then ordered the plaintiff to make the seam blast, the plaintiff not having knowledge of such dangerous condition equally with the defendant, the defendant is liable; for, it being the master's duty to inspect, the plaintiff would be justified in the absence of knowledge or information to the contrary, in assuming that the defendant had performed its duty fully in this regard and to rely upon it without inspecting for himself; *Eastman v. Curtis*, 67 Vt. 432, 32 Atl. 232; *Lassasso v. Jones Bros. Co.*, 88 Vt. 526, 93 Atl. 266.

What is said before seems to bring the case more particularly within the doctrine of *Lassasso v. Jones Bros. Co.*, *supra*, than within that of the Conroy case in 86 Vt. 175, 84 Atl. 737. In the order given and the inspection made, Lance acted as and for the master and hence the fellow servant rule is not involved. The plaintiff had the right to depend upon the master, it being present by its agent directing the work, and the plaintiff had also the right to presume that the master would warn and save him from needless exposure to injury; *Owensboro v. Gabbart*, 135 Ky. 346, 122 S. W. 178, 135 Am. St. Rep. 462, 21 Ann. Cas. 705.

The second ground of the defendant's motion was that there was no evidence tending to show negligence on the part of the defendant. The fact that Lance was in haste to have his order performed promptly, the evidence that the stone moved of its

own weight, shortly after Lance made his investigation, that a spark was liable to be produced by the movement of one stone upon the surface of another, the position of the rock resting upon an inclined surface, and the ignition of the powder simultaneously with the movement of the rock, the full and detailed account of all the circumstances of what occurred after the order to blast was given were matters to be submitted to the jury and which cannot be said to have no tendency to show that the defendant was negligent.

The fifth ground of the motion that the injury was the result of the plaintiff's contributory negligence is without merit. The case is very full and complete with reference to what the plaintiff did in connection with the accident, and it was for the jury to say from all these facts whether the plaintiff was guilty of contributory negligence.

The other grounds of the motion require no further discussion, as what we have already said sufficiently covers them. The motion for a directed verdict was properly overruled.

The defendant took fourteen exceptions to the charge of the court below, only one of which, we think, is necessary to consider in disposing of the case, and that exception is defendant's third exception, which was to the submission to the jury of the question of Lance's incompetency as a fellow servant. The ground of the objection was that there was no evidence tending to show that Lance was incompetent; that although he may have been guilty of an act of negligence in this particular case, such negligence standing alone would be insufficient to establish the fact of his incompetency.

The plaintiff, on the other hand, argues that where there is only one act of negligence of the servant shown, such act may be of such a character, though standing alone, as to establish the fact of incompetency and he claims that this case is of that character and cites: *Mahoney's Admr. v. Rutland R. R. Co.*, 81 Vt. 210, 69 Atl. 652; *Place v. Grand Trunk Ry. Co.*, 82 Vt. 42, 71 Atl. 836; *Russ v. Central Vt. Ry. Co.*, 78 Vt. 424, 63 Atl. 134, and *Evansville, etc., R. R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. 101, 7 Am. St. Rep. 458. We think that none of these cases cited by the plaintiff support his contention. In *Mahoney's Admr. v. Rutland R. R. Co.*, *supra*, the negligence was accompanied by evidence that the telegraph operator who failed to report the departure of the train knew that the rule required him to do so but

did not know that the rule required him to do so promptly. In that case the incompetency consisted, not in the negligent act but, in the operator's lack of knowledge of a rule necessary to be observed for the safety of the traveling public and fellow servants. In *Place v. Grand Trunk Ry. Co.*, *supra*, the negligence was accompanied by evidence that the engineer was deaf in consequence of which he did not hear a certain click which would have warned him, if he had heard it, that the engine had taken the wrong track, resulting in the plaintiff's injury. In that case the incompetency did not consist in the negligent act, but in the engineer's defective hearing. In *Russ v. Central Vt. Ry. Co.*, *supra*, the negligent act was accompanied by evidence that the engineer, although competent as such, was not acquainted with the road over which he was running at the time of the accident, and because of this the accident happened. In the Mahoney case ignorance of the telegraph operator was the ground of the servant's incompetency. In the Place case the engineer's deafness was the ground of his incompetency, and in the Russ case the engineer's lack of knowledge of the road was the ground of his incompetency. None of the foregoing cases support the claim of the plaintiff. In *Evansville, etc., R. R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. 101, 7 Am. St. Rep. 458, it is said: "It may be conceded that the evidence in the record fully establishes the fact that Stice had been for years a faithful, vigilant and competent brakeman, and that he had fairly earned his recent promotion to the position of freight conductor by long and diligent service for the company; and the idea is not to be tolerated that the law will pronounce a person who is shown to be qualified by years of efficient service incompetent because of a single mistake or act of forgetfulness." In another place in the opinion, it is true, the court says that a single case, *with the circumstances surrounding it*, may tend very strongly to show the incompetency of the actor to perform the service to which he was assigned; but the case nowhere holds that the accident alone, without the surrounding circumstances, would establish incompetency. We think that case does not support the claim of the plaintiff made in this case; for in this case the evidence fails to disclose any attending circumstances giving character to the negligent act as an act of incompetency. Indeed the evidence does not disclose just what examination Lance made before ordering the seam blast, and his negligence, which the evidence

tends to show, must be inferred to be the result of haste in that particular instance and not the result of incompetency. In cases where incompetency is charged, it is essential in the consideration of that matter, to keep clearly in mind the distinction between the act resulting from negligence alone and one resulting from incompetency. Incompetency and negligence are not convertible terms, for the most competent may sometimes be negligent; while incompetency goes to unreliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment; *Maitland v. Gilbert Paper Co.*, 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137; *Coppins v. New York Central R. & H. R. Co.*, 122 N. Y. 557, 25 N. E. 916, 19 Am. St. Rep. 523. Our attention has not been called to any case where it has been held that a single act of negligence, unaccompanied by circumstances tending to show incompetency, is in itself evidence of that fact and we know of no such case. In the case at bar, Lance had been at work for the defendant for a long time, and as far as the case shows, had never been guilty of negligence or incompetency before the plaintiff's injury, and there is nothing in the evidence tending to show any circumstances attending the alleged negligent act, from which it can be inferred that Lance was incompetent, and it was error to submit that question to the jury and harmful error, for its submission confused the real issue in the case as appears from the special verdict rendered in the case.

As this holding makes it necessary to send the case back for a new trial, we deem it unnecessary to consider any of the other exceptions raised in the case, as the same are not liable to arise on another trial.

Judgment reversed and cause remanded.

HENRY RUSS v. MICHAEL GOOD.

October Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 19, 1917.

Evidence—Cross Examination—Exceptions—When Controlled by Transcript—Plea of Guilty to Criminal Complaint—Weight as Evidence in Civil Suit—Discretion of Court—Argument to Jury—Harmless Error—Charge of Court.

In an action of trespass for assault and battery, where defendant testified, on direct examination, that he had seen plaintiff strike and kick another person upon a certain occasion, it was not error to allow the question, on cross examination, whether that person had not been greasing the face of the plaintiff's hammer; and defendant's reply that he knew nothing about that rendered the answer harmless.

A plea of guilty to a criminal complaint for breach of the peace is an admission that the conduct in question was unlawful and, in a civil action to recover damages resulting from the assault committed in the transaction, the weight to be given to the plea, as evidence, depends upon the conditions and circumstances under which it was entered, and it is the duty of the jury to consider the admission in the light of such explanation as defendant sees fit to give, a full opportunity to test the reasonableness of such explanation by means of cross examination having been afforded.

Under the circumstances, *held*, that the trial court did not overstep the bounds of discretion in permitting cross examination of defendant upon his explanation of a plea of guilty entered by him to a charge of breach of the peace.

Where it does not appear that there was prejudicial error in the argument of counsel to the jury, an exception thereto will not be sustained.

In an action of trespass for assault and battery, the charge of the court upon the subject of self defence examined and, taken as a whole, *held*, not misleading.

In an action of trespass for assault and battery, the charge of the court upon the subject of a plea of guilty entered by defendant to a

criminal complaint for breach of the peace, *held* without error, it fairly appearing that the complaint included the assault committed upon plaintiff.

TRESPASS for assault and battery. Pleas, the general issue, and self defence. Replication, *de injuria*. Trial by jury at the September Term, 1916, Washington County, *Fish*, J., presiding. Verdict for plaintiff. Defendant excepted. See the prior report of this case, 90 Vt. 236, 97 Atl. 987.

Plaintiff and defendant were granite cutters, employed by the same firm. The employees were accustomed to eat their dinners each day in a room near the main shed, in which there was a table so placed that one end was against the wall of the room, and one side so close to another wall that there was only room for a bench upon which defendant was seated. Plaintiff sat on the opposite side of the table, but not directly facing defendant. A dispute arose between the parties, and, during it, defendant stepped upon the table, and across it, as was often done by those sitting on his side of the table who wished to leave the room, and, as he passed the plaintiff, struck him and broke his jaw. There was evidence on the part of defendant of previous threats made by plaintiff toward him. Defendant's evidence tended to show that, as he stepped across the table, plaintiff moved toward him, assumed a threatening attitude, called him vile names, and made as if to strike him in the stomach; that he warned plaintiff to stand back, and that, to defend himself, he struck the blow complained of.

Plaintiff's evidence tended to show that when defendant stepped upon the table, he was standing on the floor, and made no move toward defendant nor motion to strike him.

It appeared that, soon after the event, defendant pleaded guilty to a criminal complaint for a breach of the peace, the complaint being for the same acts complained of in this suit.

John W. Gordon and *S. Hollister Jackson* for defendant.

Richard A. Hoar for plaintiff.

TAYLOR, J. The action is trespass for an assault and battery. The case was tried at the September Term, 1914, of Washington County court on a plea of self defence, with verdict and

judgment for the defendant. It came to this Court on exceptions and was reversed for improper argument. 90 Vt. 236, 97 Atl. 987. After the remand the pleadings were amended by adding the replication *de injuria* and a new trial was had, resulting in a verdict and judgment for the plaintiff. The facts developed on the retrial were substantially the same as at the previous trial and are sufficiently detailed in our former opinion.

The defendant testified in direct examination that on a certain occasion he saw the plaintiff strike and kick a young man named Meeker. In cross examination he was asked if Meeker hadn't been greasing the face of plaintiff's hammer and tools so that, when plaintiff would strike, his hammer would slip off, and under exception replied: "I don't remember any greasing about it. I don't know anything about that." This was not error. The defendant had testified that he was present and saw the affair. It was proper to find out all that he knew about it that would affect his estimate of the plaintiff as a "man of war." Besides, the answer was colorless and no possible prejudice to the defendant could have resulted.

Later, Meeker was called as a witness in rebuttal and after testifying that on the occasion in question the plaintiff kicked him, but did not strike nor injure him, he was asked: "What did you do just before that?" and answered before an objection was interposed: "We greased his hammer." Discussion followed at the close of which the court excluded the question and allowed the plaintiff an exception. The matter has been argued here as though the ruling was the other way, as indeed the bill of exceptions would seem to indicate. But the transcript is made controlling and clearly shows that the defendant has no cause for complaint.

It had appeared in evidence that soon after the encounter with the plaintiff the defendant pleaded guilty in the Barre city court to a grand juror's complaint for a breach of the peace on account of the transaction involved in this suit. The defendant had testified in direct examination that he did this upon the advice of the chief of police of the city of Barre, that it was cheaper and easier for him than to try the case. Four exceptions were saved in the course of his cross examination on this subject. They are so related that they can most conveniently be considered together and raise the question of the scope of proper cross examination. Defendant's counsel contend that "the char-

acterizing of the defendant" and the inquiries as to his property were outside the limits of legitimate cross-examination.

Briefly stated the situation was this: After the defendant had said in cross-examination that the reason why he pleaded guilty was "to get off as easy and cheap as he could,—didn't want any further trouble," he was asked: "And you had rather have a police record than to try the case and be acquitted of the charge * * * that the kind of a man you are?" Against an objection by his counsel "to his characterizing the kind of a man he is," defendant replied under exception: "Well, I didn't have any money." Then followed the other questions objected to, which developed the fact that the defendant when he pleaded guilty held the title to a cottage house, a double tenement house and two lots, though he didn't have them paid for.

Defendant's plea was an admission that his conduct on the occasion in question was not justifiable and lawful, but unlawful and criminal. The weight to be given to it as evidence in this case depended upon the conditions and circumstances under which the plea was entered, and it would be the duty of the jury to consider the admission in the light of such explanation as the defendant saw fit to give. *Russ v. Good*, 90 Vt. 236, 240, 97 Atl. 987; *McKinstry v. Collins*, 76 Vt. 221, 227, 56 Atl. 985. But the interests of justice required that a full opportunity be given to test the reasonableness of the explanation by cross examination. It is clear that the court did not overstep the bounds of discretion in permitting the cross-examination to go to the extent it did. The criticism as to "characterizing the defendant" is without foundation and in the inquiries as to property counsel only followed where the defendant led in attempting to extricate himself from an embarrassing situation.

In the closing argument counsel for plaintiff called the jury's attention to the fact which appeared in evidence that all the witnesses summoned by the plaintiff were still working for Jones Brothers and inquired: "Where is Good?" Defendant's counsel objected saying: "He is probably trying to make the inference that the defendant was ejected, instead of voluntarily stepping out and going to farming a good while after this thing occurred." When asked by the court what he had to say, plaintiff's counsel replied: "That it is perfectly proper to show that he is not there with the boys now." Thereupon the court directed him to go on and allowed the defendant an exception.

Plaintiff's counsel continued: "What I was arguing to you, gentlemen, you see the trouble he had there, you have heard him tell about it, and so far as the witnesses can tell you about it, were from the statements of his own brother—or the action of his own brother—he seems to be an undesirable element; and the other witnesses that appear here in court, as far as they have testified, they are still at Jones Brothers and this disturber is no longer at work at Jones Brothers." On defendant's counsel asking for an exception to the continuing of this line of argument the court, addressing counsel, said: "I think your argument is pretty doubtful on that point * * *. There is a good deal of question whether you ought to go to the jury on the question as to whether the defendant stayed or went away from the Jones Company, and I think I will say in that regard that your argument better not be regarded by the jury. I don't think it will help them any." To this plaintiff's counsel replied: "If the court thinks it is improper I will withdraw it." Defendant's counsel asked that so far as the matter had gone they have what benefit there was to the exception and the incident was closed by an exception being noted for the defendant.

It will be observed that the exception of which counsel asked to be saved the benefit, was the exception first noted and that the later objection was made to the continuing of that line of argument. The court on reflection in effect sustained this objection and apparently allowed the last exception to save to the defendant the benefit of the first. What plaintiff's counsel said in continuing the argument was in substance a repetition of what he had already said and, it is agreed, was entirely within the evidence. The fault with it was what defendant's counsel indicated, *viz.*, its probable use as the basis of an inference that the defendant had been discharged by his employers because of what had happened. But the argument had not gone so far as to ask the jury to draw that inference. Defendant's counsel availed himself of the opportunity to suggest to the jury that the defendant had left voluntarily and gone to farming a long time after the affair occurred. It clearly would have been error to have permitted plaintiff's counsel to argue the inference forecast by his argument so far as it had proceeded; and the situation as it had developed would better have been dealt with more vigorously by the court. But we are unable to say that defend-

ant's rights were injuriously affected in view of all that transpired.

In their argument in support of this exception defendant's counsel contrast the argument challenged here with that on which the case was reversed at the former hearing. But the situation is not at all alike. The question when error in argument requires a reversal is so affected by the attending circumstances that there is little profit in comparing one case with another; however, we note some of the points of difference. There, the error was in challenging plaintiff to a test of weight after the evidence was closed and when he was not in a position to accept the challenge, if he had so desired. The court granted an exception without comment, thus impliedly approving the challenge. There was nothing by way of withdrawal. Here, the discussion related to facts which appeared in evidence. At most there was only a suggestion of an improper inference. The jury must have understood from what the court finally said that the argument was regarded as improper; hence, counsel's qualified withdrawal tended to correct the error. It should be remembered that the effect of error when found is not the same under the present practice as it was formerly. Then, the rule was that a reversal followed unless it clearly appeared that the error was harmless. See *Wilson v. Blake*, 53 Vt. 305; *Johnson v. Cate*, 75 Vt. 100, 53 Atl. 329. Now, the error works a reversal only when the record satisfies the Court that the rights of the parties have been injuriously affected thereby. Supreme Court Rule 7. The former hearing in this Court was on a record made up before this rule became effective. It not being made to appear that there was prejudicial error in the argument, the exception is not sustained.

The defendant excepted to the court's use of the expression "actual assault" in charging the jury on the matter of self defence. It was said as a ground of the exception that the jury would take the expression in its common use as amounting to a battery and construe the charge as meaning that the plaintiff must have committed a battery upon the defendant before the latter could use force in defence. The court first carefully instructed the jury as to the distinction between an assault and a battery, correctly defining the former and applying the term "assault and battery" to the latter. The charge then proceeded: "Now the question here is whether at the time this blow was

struck (referring to the blow defendant admitted having struck the plaintiff) * * * an assault was being made upon the defendant; whether the plaintiff here was so related to the defendant there at that time and place that an assault was being made upon the defendant here by the plaintiff, the plaintiff standing in such a relation to the defendant, his body so situated, his arms or hands so situated, and his general attitude and appearance being such that at the time the blow was struck and the injury done, there was an actual assault being committed on the part of the plaintiff here toward the defendant. Now was there such an assault being committed at that time and place? * * * If you should find on the evidence there was not such an assault being committed then it would be your duty to find for the plaintiff to recover, because the defendant has no claim here that he is right in this matter except upon the theory of this assault." Then follow further instructions as to the right of self defence, if the jury found that there was an actual assault committed by the plaintiff, concluding as follows: "Now assuming that the plaintiff here did make an assault such as defendant here claims he did make, * * * did it appear to the defendant at the time, under whatever circumstances, that unless he struck this plaintiff he was in danger of receiving great bodily harm at his hands? If that is so, then he had a right to protect himself and to act seasonably * * * in order to make his defence effectual; he was not bound to wait until an assault had actually been made upon him before he undertook to protect himself. * * * You will keep the principles in mind if you find the plaintiff here actually made an assault upon the defendant here at the time of the injury complained of."

The use of the term "actual assault," as well as the expression "an assault had actually been made," was not accurate and standing alone might tend to confuse the jury, the former to the prejudice of the defendant and the latter to his advantage. But considering the charge as a whole we do not think the jury was likely to be misled thereby. There was no evidence that the plaintiff struck the defendant. Defendant's testimony was that the plaintiff approached him in a threatening manner and that, anticipating a blow, he struck the plaintiff without being struck himself. So, when the court said near the close of the charge on this subject, "assuming that the plaintiff here did make an assault such as the defendant here claims", it would correct any

impression that the jury might have gained that the defendant could not strike in self defence until he was himself struck. Any possible doubt remaining would have been removed when, among the last things the court said upon the subject, was the instruction that the defendant was not bound "to wait until an assault had actually been made upon him," before having a right to protect himself. This exception is not sustained.

The defendant excepted to what the court said about the issue being the same in a civil and criminal case and as to the effect of the plea of guilty in the city court. The court explained to the jury the use they could make of the record against the defendant in the city court in a manner not excepted to. The only complaint made is that the jury was told that the law in the two cases was alike except as to the burden of proof, but that the issue was the same. It is argued that the plea was not necessarily an admission of a battery or an assault upon the plaintiff but was only an admission by the defendant that he had broken the peace, which could have been done in several ways without doing that which would sustain this action.

Doubtless a state of facts could exist where the charge would be erroneous in the matter complained of, but it does not follow that it is so here. It fairly appears that the complaint to which the defendant pleaded guilty included among other things the charge of a breach of the peace by assaulting and beating the plaintiff on the occasion in question. The defendant made no claim that his plea related to any other matter, if, indeed, he could have been heard to contradict the record that he pleaded guilty to the whole charge. No claim was made at any stage of the trial that both proceedings did not relate to the same transaction, and the evidence certainly tended to show their identity. The charge in the particular complained of was not inappropriate to the case made in the evidence and the exception is without merit.

Judgment affirmed.

IN RE FRANK A. TURNER.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed January 4, 1918.

Habeas Corpus—Judgment not a Bar to Subsequent Proceedings—Jurisdiction Challenged by Writ—Statutes—Construction—Repeal of former Enactments—Judicial Notice—History of Legislative Enactment—Question Raised Under Writ of Habeas Corpus—Sufficiency of Complaint.

A judgment on *habeas corpus* remanding the prisoner is not, as matter of law, a bar to subsequent proceedings of the same kind founded on the same facts, but the courts and justices or judges having jurisdiction have power to prevent an abuse of the writ.

The writ of *habeas corpus* challenges the jurisdiction alone, and the inquiry is not confined to the jurisdiction over the subject matter and the person, but extends to the jurisdiction to render the particular judgment.

A statute will not be construed as repealing a former act on the same subject, in the absence of express words to that effect, unless there is such an inconsistency between them that they cannot stand together, or unless the latter act is evidently intended to supersede the former in respect to the matter in hand and to comprise in itself the sole and complete system of legislation on that subject.

Judicial notice is taken that No. 101, Acts 1915, was prepared and recommended by the National Conference of Commissioners on Uniform State Laws and that, at the time of its adoption by the Vermont Legislature, it had already been adopted by several of the other states.

P. S. 5726 was repealed by No. 101, Acts 1915.

The question raised under a writ of *habeas corpus*, issued on a complaint that the relator is unlawfully imprisoned after conviction of a crime, is not whether the complaint on which he was convicted is sufficient as a matter of pleading, but whether it is void in that it describes no offence of which the court has jurisdiction.

PETITION for writ of *habeas corpus* brought to the Supreme

Court for Rutland County, and heard on an agreed statement of facts, and motion to dismiss. The opinion states the case.

Lindley S. Squires for the relator.

The former proceedings in county court, wherein relator's petition for a writ of *habeas corpus* was dismissed do not constitute a bar to this proceeding. *Re Barker*, 56 Vt. 1; *Re Miskmins*, 49 L. R. A. 831; *Re Clark*, 15 L. R. A. 389; *Re Justus*, 25 L. R. A. (N. S.) 483.

C. V. Poulin, State's Attorney, for the State.

TAYLOR, J. The relator pleaded guilty September 27, 1916, in the Rutland city court to a complaint charging that he, being of sufficient pecuniary ability, at the time and place named, neglected and refused to provide necessary food and maintenance for his wife, Louise Turner, and four minor children, contrary to the form of the statute, etc. Thereupon the court sentenced him to be confined at hard labor in the House of Correction for a term of not less than eighteen months nor more than two years from the date of commitment. The same day he was committed to said place of imprisonment where he is still held in execution. He has been brought before this Court on a writ of *habeas corpus* issued on a complaint alleging that he is unlawfully imprisoned and praying that he may be relieved therefrom. The specific cause alleged why he should be discharged is that the complaint on which he was convicted and sentenced was brought under P. S. 5726, which provides a penalty of not more than six months imprisonment or a fine of not more than twenty dollars, or both; and that therefore his confinement after March 27, 1917, is unlawful.

The State's attorney challenges the relator's right to a hearing on the merits of the complaint on the ground that the proceedings are barred by a decision of the Rutland county court adverse to the relator from which no exception was taken. It is conceded that the relator was before said court at its September term, 1917, on a writ of *habeas corpus* issued on an application addressed to said court; that he then sought a discharge from his imprisonment upon two grounds, one of which is the same as that upon which the present complaint is based; that upon hearing the

county court adjudged that he was not illegally imprisoned and dismissed his complaint; and that from this judgment no exception was taken.

The question whether a decision adverse to the relator in *habeas corpus* proceedings is *res judicata* and so bars a subsequent application for the same cause is now for the first time before this Court for decision. The question has frequently arisen in other jurisdictions and an examination of the reported cases discloses a marked want of uniformity, both in reasoning and result. Some courts make a distinction between cases in which the imprisonment or restraint grows out of a civil action and those where the question is between the individual seeking his liberty and the people, or the state, seeking his restraint. In the latter class of cases the prevailing rule is that an order in one proceeding does not bar another or further proceeding for the same cause. 1 Bailey on *Hab. Cor.* 206; see *Cormack v. Marshall*, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787, 1 Ann. Cas. 256. The diversity of decisions is apparently affected to some extent by local statutes.

The Constitution of this State makes the writ of *habeas corpus* a writ issuable of right. Con. Ch. 2, Sec. 33. We have no statute regulating successive applications for the writ. The beneficent purpose of the writ is to provide a summary proceeding to determine the lawfulness of one's imprisonment or restraint. Except when imprisoned for contempt, when the writ must be returnable to the Supreme Court (P. S. 1965), application for relief may be made to the Supreme Court during its sittings, or to any Justice thereof during vacation, or to any superior judge, or to the county court in the county where the applicant is imprisoned, if in session. P. S. 1939. The court or other authority to whom the complaint is made, is required to award the writ and without delay examine the causes of imprisonment or restraint. P. S. 1942, 1954. Each is given full power to make final disposition of the application. P. S. 1958, 1960. No provision is made for review of questions of law arising in such proceedings. The general provisions of the statute relating to exceptions do not extend to the orders of a Justice of the Supreme Court, or those of a superior judge, in matters of this kind. When the application is made to the county court the relator may have its judgment reviewed on exceptions. *In re Cooper*, 32 Vt. 253. But that right is merely incidental and does not flow from

any special jurisdiction conferred on the county court in such cases.

At common law the rule is that a final judgment remanding the prisoner in proceedings on *habeas corpus* does not bar a subsequent application for another writ. *Ex parte Partington*, 13 M. & W. 679. We do not think that the rule is affected when the application chances to be to the county court. Manifestly an order by a Justice of this Court in vacation, or by a superior judge, would not bar a subsequent application to this Court for review. But their jurisdiction in such proceedings is concurrent with that of the county court; and if their orders are not *res judicata*, how can it be said that those of the county court in such matters are? Considering the nature and purpose of the proceeding, which out of regard for the liberty of the citizen brooks no unnecessary delay, and as well the absence of a provision securing a review in all cases by exceptions, it must be held that a judgment on *habeas corpus* remanding the prisoner is not, as matter of law, a bar to subsequent proceedings of the same kind founded on the same facts. See *Bradley v. Beetle*, 153 Mass. 154, 26 N. E. 429.

In re Barker, 56 Vt. 1, supports this conclusion. That was a *habeas corpus* proceeding brought to the county court which discharged the relator. The officer having him in custody excepted and the case was heard in this Court on relator's motion to dismiss the exceptions. In course of an opinion holding that when a prisoner is discharged on *habeas corpus* the officer having the custody is not entitled to exceptions, it was said, quoting Baron Parke in *Ex parte Partington*, *supra*, that the relator "may renew his application to every court in the kingdom having jurisdiction, until he obtains his liberty." It is not necessary to the decision of this case to determine the full extent of the right, but it may not be out of place to suggest that it very likely has its limitations, and that the quotation from Baron Parke removed from its context, may not be an entirely accurate statement of the law.

It was intimated in *Bradley v. Beetle*, *supra*, that it was a matter of discretion in the court or justice to hear and determine a new application when it appeared that the same state of facts continued to exist as at a former hearing; and it was held in *Ex parte Moebus*, 74 N. H. 213, 66 Atl. 641, that the same questions could not be again litigated as a matter of right. In some

of the cases a distinction is made between repeated applications to courts or judges of inferior jurisdiction and where the subsequent application is to a court of review, the latter being sustained and the former denied. It is enough for the present to say that the courts and justices, or judges, having jurisdiction in matters of *habeas corpus* are not powerless to prevent an abuse of the writ by successive applications on the same state of facts.

It is further urged that proceedings by writ of *habeas corpus* challenge alone the jurisdiction of the court and do not reach the charges and proceedings anterior to the judgment. It is the general rule that the judgment of a court of competent jurisdiction, although erroneous, is binding until reversed; and it is well settled that the writ of *habeas corpus* cannot be given the effect of a writ for the correction of errors or irregularities. *In re Fitton*, 68 Vt. 297, 300, 35 Atl. 319. It was said in this case that one who is detained upon a sentence following conviction will not ordinarily be entitled to relief, unless the defect is such as to render the proceedings void; but that if the court has jurisdiction of the subject matter and the person and renders such a judgment as it would be authorized to render in some circumstances in cases of that class, the proceedings will stand the test of this writ however irregular they may have been. It is commonly said that another court cannot by means of the writ of *habeas corpus* look beyond the judgment and re-examine the charges and proceedings on which the judgment was based. 24 Cyc. 294. Rightly understood it is well enough to say that the writ challenges the jurisdiction alone. But the inquiry is not confined to the jurisdiction over the subject matter and the person. It extends to the jurisdiction to render the particular judgment. *In re Harris*, 68 Vt. 243, 35 Atl. 55.

No question is made but that the court had jurisdiction of the subject matter and of the person and there is left for consideration the sole question whether it had jurisdiction to impose such a sentence "in some circumstances." If, as the relator contends, the subject matter was a complaint under P. S. 5726, the court plainly exceeded its jurisdiction. It could in no circumstances impose the sentence it did under that statute, and the relator would now be entitled to his discharge. But if, as the State contends, the subject matter was a complaint under No. 101, Acts of 1915, the court clearly acted within its jurisdiction in imposing sentence. The controlling question then is: Which

statute did the complaint contemplate? Both the State's attorney and relator's counsel treat P. S. 5726 as having been in force at the time in question, but we cannot agree that such was the fact without investigation. It was in force unless repealed by No. 101, Acts of 1915, and, as the latter act contains no express provision for its repeal, unless repealed by implication.

The rule is well established in this State that a statute will not be construed as repealing a former act on the same subject, in the absence of express words to that effect, unless there is such an inconsistency between them that they cannot stand together, or unless the later act is evidently intended to supersede the former in respect of the matter in hand, and to comprise in itself the sole and complete system of legislation on that subject. *Central Vt. R. R. Co. v. State et al.*, 82 Vt. 145, 149, 72 Atl. 324. Thus there may be a repeal by implication in one of two situations: (1) When the acts are so far repugnant that they cannot stand together. (2) When, though not repugnant, the later act covers the whole subject of the former and plainly shows that it was intended as a substitute therefor. *State v. Smith*, 63 Vt. 201, 208, 22 Atl. 604; *Barton Nat. Bk. v. Atkins*, 72 Vt. 33, 37, 47 Atl. 176.

The two statutes in question have the same general object. They were designed to compel delinquent husbands to support their dependent wives and minor children. P. S. 5726 was originally enacted under the title, "An act to compel certain persons to maintain their families." No. 35, Acts of 1890. As subsequently amended, the act provided that a person who, being of sufficient ability, neglects or refuses to provide necessary food and maintenance for his wife or minor children shall be imprisoned not more than six months or fined not more than twenty dollars, or both. No. 101, Acts of 1915 is entitled, "An act relating to desertion and non-support of wife or child and providing punishment therefor and to promote uniformity between the states in reference thereto." It contains eight sections. Section 1 provides that a husband who shall, without just cause, desert or wilfully neglect or refuse to provide for the support and maintenance of his wife in destitute circumstances, or any parent who shall, without lawful excuse, desert or wilfully neglect or refuse to provide for the support and maintenance of his child under the age of sixteen years, in destitute circumstances, shall be imprisoned at hard labor not more than two years or fined

JOHN E. WATERMAN v. ABBIE E. MOODY AND HENRY H. ROGERS.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 12, 1918.

Chancery Pleading—Answer—Demurrer—Sufficiency of Bill—Amended Bill—Cross Bill—Departure—Findings of Fact—Exceptions—Trial—Objection not Made Below—Harmless Error—Presumptions—Possession of Real Estate—Right of Way—Adverse Possession—Interruption—Evidence—Declarations Against Interest—Admissions—Parol Evidence—Admissibility of Grand List Books—Entry Upon Real Estate—Presumed to be Under Deed—Tenancy in Common—Ouster of Co-tenant—Claim of Right to Entire Premises—Conveyance of Entire Premises—Payment of Taxes—Remoteness of Evidence—Discretion of Court—Burden of Proof—Adverse Character of Right of Way—Findings by Chancellor—Transcript—When Findings Supported by Evidence—When not Prejudicial—Presumptive Grant—When Supported by Evidence—Exceptions to Findings of Fact—Record—Construction—Intendments Against Exceptor—Motion for Reargument—When not Granted.

With the exception that a defendant in a suit in chancery may, under Chancery Rule 15, insert in his answer any special matter that goes to the merits of the bill with the same benefit as if he had formally demurred to the bill, there must be no overlapping of defenses, and, if a defendant answers a part of the bill and then demurs to the same matter, his answer will overrule his demurrer.

Allegations in a bill in chancery that plaintiff and his predecessor in title made improvements on premises to which plaintiff claimed a prescriptive title, and in which defendant claimed a half interest, cut wood thereon and paid the taxes, are not demurrable on the ground that thereby plaintiff acquired no right to deny defendant's title, where these and other circumstances alleged, taken together, are sufficient to afford a presumption of a conveyance from defendant's predecessor to plaintiff's predecessor, as well as to show

an ouster of defendant's grantor, such as would ripen into title by adverse possession.

After having filed an amended cross bill, defendants in a suit in equity cannot be heard to complain that plaintiff is permitted by a supplemental bill, in the nature of a cross bill, to seek affirmative relief appropriate to the case made out by them in their amended cross bill.

Where plaintiff, in his original bill, alleged that he and his father before him owned and occupied a certain farm, but without setting out by what title, there was no departure when, in a supplemental bill, plaintiff alleged his title with particularity, and consistently with the earlier allegation of ownership.

Where plaintiff's evidence tended to show title to the premises in question in the grantor of his predecessor in title, to an undivided one-half by the record and to the other half by a lost grant, an exception to a finding of the chancellor, based upon a deed from such grantor to plaintiff's predecessor, on the ground that such deed was received on the understanding that it should be used as evidence only if a title should be shown which could be conveyed by the grantor, is without force.

A ground of objection, not raised at the trial, will not be considered in Supreme Court.

An exception to testimony which cannot possibly have prejudiced the excepting party is without merit.

Where it appears that one is in possession of real estate, it will be presumed that his possession is lawful, nothing to the contrary appearing.

Interference with the enjoyment of a right of way by one in possession under the owner of the land has the same effect, as an interruption of adverse possession, as would the same act by the owner himself, and bears upon the question of the continuous use of the right of way by the claimant thereof.

An inventory of an estate, made and filed by the administrators thereof, one of whom was intestate's sole heir at law and succeeded to all his property and was also defendant's grantor, wherein there is no mention of the land in question, which was claimed to have been inherited by defendant's grantor from the intestate, stands as a declaration against an existing interest made by defendant's grantor before attempting to convey the premises.

The admissions of a predecessor in title, made while the title was by hypothesis still in him, are not governed by the hearsay rule and

its exceptions, but are to be treated as primary evidence, and, on the ground of privity, stand as though made by the party opponent. The test of the admissibility of an admission made by a predecessor in title is whether, if the one who has made the admission was asserting ownership of the premises, his admission in the nature of a disclaimer would be evidence against him.

Disserving declarations of a former owner of real estate made before he parted with the title are admissible against those claiming under him on any issue relating to title, ownership, or possession which may be proved by parol evidence.

Whether plaintiff's predecessor in title acquired ownership of the land in question in part through a presumptive grant is an issue provable by parol evidence.

An exception to a finding by the chancellor, made upon evidence not received under exception, is without merit.

Where it is material to show who paid the taxes upon certain premises in question, the grand list books, showing to whom they were listed for taxation, are competent evidence.

The entry by a grantee in a deed upon the premises described therein, nothing to the contrary appearing, will be presumed to be under the deed.

One tenant in common may acquire title by adverse possession against his co-tenant; but this presupposes an ouster, otherwise the possession of one is, in law, the possession of both.

In determining whether certain acts of one joint tenant are evidence of an ouster and possession adverse to another joint owner, much depends upon the circumstances of the entry, there being an important distinction between the case where a tenant in common entering or being in possession as such subsequently asserts a claim adverse to his co-tenant, and the case where the entry is accompanied by such adverse claim.

Where an ouster is asserted by one who has held possession for or with his co-tenant the presumptions are against him and can only be overcome by some overt and notorious acts of an unequivocal character, indicating an assertion of ownership of the entire premises to the exclusion of the right of the co-tenant.

Where the entry of a joint owner of real estate is not in subordination to the common title, he does not enter as a tenant in common, and, if he enters under a deed purporting to convey the entire premises, he is presumed to have entered under a claim of right to the whole.

Where an ouster by one tenant in common of his co-tenants has been

established, whether the subsequent possession is of a character to ripen into title depends upon the same facts as in a case of adverse possession where the question of co-tenancy is not involved.

A conveyance of the entire premises by one tenant in common, with entry thereunder by the grantee, claiming title of the whole, and notice to the other co-tenant of such claim, works an ouster of the latter and lays the foundation for acquiring title to the whole by adverse possession.

The payment of taxes by one co-tenant in possession is admissible on the issue of a presumptive grant to such co-tenant from the other joint owner of the premises.

The payment of taxes by the actual occupant of land is some evidence of the adverse character of the occupancy and, if continued over a long period unexplained, affords strong evidence that the possession was under a claim of right and adverse.

The payment of taxes by one tenant in common in possession will not alone show an ouster of his co-tenant, and may not tend to show it, the presumption being that in doing so he acted for himself and his co-tenant; but where the ouster is otherwise established, evidence of such payment is admissible as tending to characterize the payer's subsequent possession as being adverse.

Evidence that the relations between two tenants in common were very friendly and confidential is admissible upon the issue of a presumptive grant from one to the other.

Where evidence is not as matter of law too remote to be admissible, its admission, as against the objection of remoteness, lies in the discretion of the trial court.

The burden of proving that a right of way is adverse is upon the party alleging it.

Where the chancellor is sitting as trier of facts it is for him to say, in the exercise of a sound discretion, when and how far the subordinate facts upon which he rests his ultimate findings shall be reported.

If the evidence to support a finding made by a chancellor is not sufficient, or if the supporting evidence is not admissible, or if a material finding which the evidence compels is denied, the rights of the aggrieved party can be protected by proper exceptions, and, if an exception is taken which necessitates an examination of the evidence in Supreme Court, it is the duty of the chancellor, upon written request, to send up such portions thereof as the circumstances require.

A finding that a person must have frequently passed by a certain farm is supported by evidence that the farm was on the main road, four miles from his residence, and that he was a hotel keeper and livery man.

A party is not prejudiced by a finding which can be rejected without disturbing the decree against him.

It will not be presumed that a chancellor made an improper use of a fact found in determining the ultimate questions for decision.

A finding that one had no claim against the estate of a deceased person is supported by evidence that the records of the probate court showed no claim presented.

It is not necessary to support the presumption of a grant that the trier should believe and find that a conveyance was in fact executed, but it is sufficient if the evidence leads to a conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its non-execution.

In the absence of evidence of the actual execution of a deed of real estate, a conveyance may be presumed, when no facts are shown inconsistent with the supposed existence of such conveyance, and where the things done and omitted with regard to the property in controversy by the respective parties, for long periods of time after the supposed execution of the conveyance, can be explained satisfactorily only upon the hypothesis of its existence.

The circumstances of this case, *held*, to support the presumption of such a conveyance.

A deed of one tenant in common to a stranger, of the entire premises, with possession thereunder by such stranger claiming title to the whole, coupled with notice to the other co-tenant, affords a sufficient basis for a finding of an ouster of the latter.

Where there is evidence to afford the basis of an inference that a co-tenant had notice of an adverse claim to the entire premises by a grantee of the whole under a deed of the other co-tenant, a finding of such notice will not be disturbed.

In order to charge a co-tenant with notice of an adverse claim to the entire premises, it is sufficient if the acts of adverse possession are such in their nature and attending circumstances that one reasonably attentive to his own interests would thereby know that an adverse right is being asserted.

An exception to a conclusion stated in a chancellor's findings of facts, based upon and supported by facts and circumstances also stated therein, will not be sustained.

In construing the record to determine whether certain evidence was received under exception, all intendments are against the exceptor. Where it appeared that a tenant in common had given a deed of the whole premises to a stranger, who occupied thereunder claiming title, with notice to the other co-tenant, without objection by the latter, and that the land had never been listed to the latter for purposes of taxation, the fact that the latter was a careful business man was a circumstance to be taken into consideration, with the other facts and circumstances, on the issue of a presumptive grant from him to his co-tenant.

Where a question has been decided in Supreme Court upon a ground not argued, the Court will not, on motion for reargument, reopen the case to give the unsuccessful party opportunity to debate the matter, no error being pointed out.

In order to effect an ouster of a co-tenant by entry and claim of title under a deed of the entire premises given by the other co-tenant, either actual notice to the former of the claim, or circumstances from which notice will be presumed is required.

Carpenter v. Hollister, 13 Vt. 553, distinguished.

APPEAL IN CHANCERY. Heard on issues presented by the pleadings, facts found by the chancellor and defendant's exceptions thereto, in vacation after the June Term, 1916, Windsor County, *Fish*, Chancellor. Decree for plaintiff. Defendants appealed. The opinion states the case.

March M. Wilson for plaintiff.

Charles Batchelder for defendants.

TAYLOR, J. The plaintiff and the defendant Abbie E. Moody occupy adjoining farms in Royalton. The defendant Henry H. Rogers resides with and assists the said Abbie E. in managing her farm. The plaintiff's farm is sometimes referred to as the Lyman farm and defendants' as the Fay farm. A wood lot connected with defendants' farm is so situated that it can be reached most conveniently by crossing plaintiff's meadow land.

In his original bill the plaintiff seeks to have the defendants enjoined from crossing his land in going to and from said wood lot. By a joint and several answer and cross bill the defendants

set up a prescriptive right of way across plaintiff's land and ask that he be enjoined from interfering therewith. Issue was joined on the bill, answer and cross bill and the case came on for hearing before the chancellor. At the opening of the hearing the defendant Abbie E., had leave to file an amendment to the answer and cross bill in which she averred that, since the filing of the original answer and cross bill, she had acquired by purchase and conveyance from one Denison B. Woodward an undivided interest in the premises occupied by the plaintiff which entitled her to the enjoyment of said premises in common with the other joint owners, and she asked that her title thereto be confirmed. The chancellor proceeded to hear the evidence relating to the right of way, reserving to the plaintiff the right to answer the amended pleadings. Later the plaintiff filed papers entitled "answer to amendment to cross bill" and "supplemental bill." In the former he reaffirmed his statement as to the title and ownership of the farm and denied the allegations of the amended cross bill, except that he acknowledged information and belief that Abbie E. had obtained and placed on record a quitclaim deed from said Woodward purporting to convey some interest in the premises. In the supplemental bill he alleged that the defendant Abbie E. now claims to be the owner in fee of an undivided half interest in the Lyman farm; that she had obtained and placed on record a quitclaim deed from one Denison B. Woodward, son and sole heir at law of Charles H. Woodward, purporting to convey such interest; that she has no interest in said farm, notwithstanding said deed, for the reason that said Woodward had no interest therein at the time of the conveyance; and that said deed is a cloud upon his title. The bill sets out in detail the record title of the farm which shows that the title of record to an undivided half interest was at one time in Dudley C. Denison and to the other half in his son-in-law, Charles H. Woodward. It is further alleged that said Denison subsequently conveyed the whole of said farm by warranty deed to the plaintiff's father, Robert Waterman, that plaintiff believes that said Charles H. Woodward took his deed of a half of said farm in behalf and as agent of said Denison, at his request and for his benefit; that said Denison conveyed the farm to plaintiff's father with the full knowledge and approval of said Woodward; that it was agreed that said Woodward should execute necessary conveyances to give said Denison and his grantee full and perfect

title, which the said Woodward did execute, but through some accident or mistake such conveyance was either not fully perfected or was not duly recorded. Further circumstances are alleged tending to support a presumptive grant from Woodward to Denison. The prayer of the bill is that the defendant Abbie E. be enjoined from asserting any right, title or interest in and to said farm; that the deed from the said Denison B. Woodward to the defendant be decreed of no effect; and that the plaintiff's title be confirmed and validated against the defendant Abbie E., and all persons claiming under her.

The defendants filed an answer to the "supplemental bill," craving the benefit of a demurrer to certain allegations thereof and, on certain grounds, to the whole bill. The cause coming on for further hearing, the chancellor overruled the demurrer, reserving the benefit thereof to the defendants at the final hearing. The defendants excepted to certain rulings of the chancellor during the trial, to certain findings of the chancellor as not being supported by the evidence and to the refusal of the chancellor to find in accordance with certain requests. On the facts found the chancellor decreed that the defendant Abbie E. has no right of way across plaintiff's land and perpetually enjoined the defendants, their servants and agents, from crossing the same; that the deed from Denison B. Woodward to the defendant Abbie E. is of no effect and shall be held for nothing, and that as against the said Abbie E. and those claiming under her the plaintiff's title to said farm be established and confirmed; and that the defendants pay the plaintiff fifteen dollars damages for the wrongful use of his land under the claimed right of way. The case is here on defendants' appeal.

The points of defendants' demurrer have been argued in detail and at considerable length, but it will not be necessary to treat the questions *seriatim*. As to twelve of the thirteen points of special demurrer the defendants answered, either by admitting or denying the allegations of the bill or alleging want of knowledge and putting plaintiff to his proof, and at the same time set out special matters by way of demurrer, craving the same benefit thereof as though they had formally demurred. If we treat such claim of special matter as a demurrer, it does not avail the defendants. They could not at the same time both answer and demur to the same matter. The regular modes of defence to a bill are disclaimer, demurrer, plea or answer. It is not essential

that the entire bill be met by the same mode of defence. Thus, a defendant may demur as to part, plead as to part, disclaim as to part and answer the residue. Chan. Rule 14; 2 Dan. Ch. Pr. 349; 1 Whit. Eq. Pr. § 213. Where such course is adopted it is essential that the pleading designate with precision the portion of the bill to which it is intended to apply and care should be taken not to cover any portion by two modes of defence, the general rule being that one may not at the same time demur and plead to, or demur and answer the same matter. See 16 Cyc. 259 where the cases are collected. With us the general rule has certain modifications. No demurrer is to be held bad because the answer extends to some part of the matter that is covered by the demurrer. Chan. Rule 19. A defendant may insist in his answer on any special matter that goes to the merits of the bill with the same benefit as if he had formally demurred to the bill, (Chan. Rule 15), in which case the demurrer is for consideration as if it stood alone, (*Holt v. Daniels*, 61 Vt. 89, 17 Atl. 786), and must be brought forward for hearing before the case is heard on its merits, otherwise it is waived. *State v. Massey*, 72 Vt. 210, 214, 47 Atl. 834. But this rule does not contemplate the joining of inconsistent pleadings except such as go to the merits of the whole bill. With this exception there must be no overlapping of defences; and, if a defendant answers a part of the bill and then demurs to the same matter, his answer will overrule his demurrer. *Holt v. Daniels*, 61 Vt. 89, 93, 17 Atl. 786; *Wade v. Pulsifer*, 54 Vt. 45, 71; 16 Cyc. 280.

The remaining instance of special demurrer challenges allegations that the plaintiff and his immediate predecessor in title made extensive improvements and additions to the premises, cut wood and lumber and paid all the taxes assessed thereon, on the ground that by so doing the plaintiff has acquired no right to deny the title of the defendant Abbie E., to an undivided half of said farm. It is argued that the facts here alleged are not inconsistent with occupation in the right of his co-tenant and do not entitle him on that account to lay claim to an ouster. But the supplemental bill is not based upon the theory of an ouster alone, but as well upon that of a presumptive grant, vesting the whole title in plaintiff's grantor; and the questioned allegations are but part of many circumstances alleged as the basis of an inference that Denison, prior to his deed to plaintiff's father, became the sole owner of the premises. All the circumstances

alleged taken together are sufficient to afford the basis of a presumption of a grant, and as well to show an ouster of defendant Abbie E.'s grantor such as in the lapse of time would ripen into title by adverse possession. See *Townsend v. Downer's Est.*, 32 Vt. 183, 211.

The defendants conclude their answer with the claim that the major portion of the supplemental bill consists of statements tending to establish that plaintiff is the owner of an undivided half of the premises by deed and of the other half by prescription, which, considered in connection with the allegations in his original bill, shows an attempt to make a new bill, based on different grounds as to title; and further that, though all the plaintiff therein alleges be true, he has an adequate remedy at law; and they crave the same benefit thereof as though they had formally demurred. Treating this, as counsel have done, as a demurrer to the supplemental bill, it raises the question of want of equity and whether there is a departure from the case made in the original bill. But neither claim is tenable. If there was such a departure it was occasioned by the defendants' amended cross bill wherein Abbie E. seeks to avail herself of this proceeding to confirm her record title as co-tenant of the plaintiff. Having invoked the aid of equity defendants cannot be heard to complain that the plaintiff is permitted by a supplemental bill, in the nature of a cross bill, to seek affirmative relief appropriate to the case made by them in their amended cross bill. Besides, there is no departure in the allegations as to title. In the original bill it is alleged that plaintiff, and his father before him, had for many years "owned" and occupied the Lyman farm, but by what title was not alleged. In the supplemental bill the title by which plaintiff owns the premises is alleged with particularity and is consistent with the earlier allegation of ownership. It is not necessary to consider whether the plaintiff would be confined to allegations of title in the original bill, if such there were, where the departure was to meet new matter introduced by the cross bill, for such is not this case. We hold that the demurrer was properly overruled.

The defendants argue an exception to the chancellor's findings because he received in evidence the deed from Denison to plaintiff's father and the deed from the latter to the plaintiff, on the ground that the deeds were not admissible under the pleadings. The deeds were offered to show plaintiff's title and

were warranty deeds purporting to convey the whole of the Lyman farm. When offered, defendants' counsel objected unless received with the understanding that a title be shown which could be conveyed by Denison, saying that they had no objection if received with that understanding to be used as evidence only if the connection was made. The deeds were received in accordance with this suggestion and there was no exception. It is now said that the deeds were received under a promise to connect them with the record title, but not so. The condition of the record title was disclosed to the chancellor in that connection and the "understanding" under which the deeds were admitted must have related to plaintiff's proposal to show title in Denison other than by the record. Waiving the objection that there was no exception to be saved by the exception to the findings, defendants' claim is without merit. If for no other reason, plaintiff's evidence tended to show title in Denison, to an undivided half by the record and to the other half by a lost grant, so the "understanding" was made good.

Defendants rely upon an exception to certain testimony given by plaintiff's father, Robert Waterman, concerning a talk with a Mrs. Fay, wife of a former owner of the Fay farm. The ground of objection argued, which is that the witness was blind and did not know Mrs. Fay, was not raised at the trial and so cannot be considered here.

Plaintiff was permitted to testify under exception that during the period they had occupied the Lyman farm neither he nor his father and brothers recognized any right on the part of the owner of the Fay farm to use the roadway. The objection was general. It is now argued that if the plaintiff had a right to state whether or not he "recognized" any such right, it was error to permit him to state what the others "recognized," that at most being a state of mind. If the point was saved by a general objection, which we do not decide, it is not profitable to pursue the inquiry, for the evidence fully disclosed all that was said and done by the parties affecting a right of way by prescription and plaintiff's testimony could not possibly have prejudiced the defendants.

Plaintiff was permitted to show by one Spaulding that a man by the name of Wilder lived on the Lyman farm for a time and had pieces of corn and potatoes where the claimed right of way crossed the farms, against the objection that any control of

the premises was immaterial unless it was the act of the owner of the fee. It appeared that Wilder was at the time in possession of the Lyman farm and it will be presumed that his possession was lawful, nothing to the contrary appearing. The objection cannot be sustained. Interference with the defendants' enjoyment of the right of way by one in possession under the owner would have the same effect, as an interruption of adverse possession, as would the same act by the owner himself. Besides, the evidence was not immaterial because it bore on the question of the continuous use of the way by the defendants, who assumed the burden of establishing the way by prescription.

Plaintiff's exhibit 5 was an inventory of the estate of Charles H. Woodward filed in the probate court by the administrators, one of whom was Denison B. Woodward, son of the intestate, from which it appears that the Lyman farm was not included in the inventory of the intestate's real estate. It was received against the objection that it had no tendency to show title in the plaintiff nor an ouster, and the defendants saved an exception. The question is argued as though the inventory were made by strangers to the title, while it derives its evidentiary force, if any, from the fact that Denison B. Woodward was intestate's sole heir at law and succeeded at his death to all his real estate. So the inventory stands as a declaration against an existing interest made by defendant Abbie E.'s predecessor in title before attempting to convey the premises. The same question is raised by exception to the evidence of certain witnesses who testified to declarations made by Charles H. Woodward, while the record title was in him, that a certain building lot was all the real estate he owned.

The defendants insist that the declarations of a former owner of real estate are not admissible against his successor in title for the purpose of impeaching a deed or defeating a record title. *Carpenter v. Hollister*, 13 Vt. 553, 37 Am. Dec. 612, is relied upon in support of this claim. That was an action of ejectment. The plaintiff was an administrator and the defendants based their claim of title on a deed from plaintiff's intestate to one Mackress, their immediate predecessor in title. The issue was whether intestate was insane at the time he executed the deed to Mackress and so incapable of making a valid deed. Evidence was received of admissions made by Mackress, while in possession of the premises under his deed, to prove intestate's

insanity. This was held to be error on the ground that under our registry system, title to land appears of record; and that to admit concessions impeaching the deed would permit the record to be contradicted or qualified by parol. *Phillips v. Laughlin*, 99 Me. 26, 58 Atl. 64, 105 Am. St. Rep. 253, 2 Ann. Cas. 1, cited to the same point, is much to the same effect. There the plaintiffs claimed title to the premises in question as heirs of John Phillips, and the defendant under foreclosure of a mortgage executed by Catherine Phillips, supported by a deed from John Phillips to Catherine. The issue was whether the latter deed was a forgery. It was held that the declarations of Catherine Phillips, made while the record title was in her, as to the validity of her deed from John were not admissible against the defendant.

In the latter case the court regarded the evidence as within the hearsay rule and not admissible under any of its exceptions. Mr. Wigmore points out that much of the confusion in the decided cases dealing with declarations or admissions relating to title to land results from failure to discriminate between cases where the hearsay rule does and those where it does not apply. He makes it clear that the admissions of a predecessor in title, made while the title was by hypothesis still in him, are not governed by the hearsay rule and its exceptions. 2 Wig. on Ev. §§ 1082, 1459. They are to be treated as primary evidence; and, on the ground of privity, stand as though made by the party opponent. *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29; *Miller v. Bingham*, 29 Vt. 82; *Hines v. Soule*, 14 Vt. 99. The distinction referred to was not regarded in *Carpenter v. Hollister*, as much of the opinion is devoted to the discussion of cases involving the hearsay rule.

The test of admissibility is whether, if the one who has made the admission was asserting ownership of the premises, his admission in the nature of a disclaimer would be evidence against him; for whenever the admissions of one having or claiming title to real estate would thus be competent against him, they are competent against persons subsequently deriving title through or from him. *Chadwick v. Fonner*, 69 N. Y. 404; note, 134 Am. St. Rep. 613.

The generally accepted rule is that dis-serving declarations of a former owner made before he parted with the title are admissible against those claiming under him on any issue relating to title, ownership or possession which may be proved by parol

evidence. For the cases supporting this principle see note, 26 L. R. A. (N. S.) 84; 1 R. C. L. 524; note, 134 Am. St. Rep. 610; 16 Cyc. 986. Mr. Wigmore phrases the principle thus: "When by the hypothesis of the party himself his title as now claimed is identical with that of another person, as a prior holder, the statements of that other person, made during the time of his supposed title, are receivable against the party as admissions." 2 Wig. on Ev. § 1081. See also 2 Chamb. on Ev. §§ 1329, 1334.

The rule was not recognized in many of the earlier cases elsewhere, nor authoritatively in this State until *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29. See 2 Wig. on Ev. § 1080. *Hines v. Soule*, 14 Vt. 99, occupies a unique position. Judge Bennett, who prepared the opinion, arrived at the conclusion now generally accepted, after an extended review of the authorities; but as the court was then constituted it was necessary to the final disposition of the case that there be a unanimous decision, so to enable the case to be ended, Judge Bennett yielded to the opinion of his two associates that such admissions could not be shown against privies in title. The decision in *Hines v. Soule* was expressly overruled in *Hayward Rubber Co. v. Duncklee* without argument or citation of authorities. So while the former case is classed as overruled, the opinion states the law of the case that overruled it. See *Alger v. Andrews*, 47 Vt. 238.

The apparent confusion in our earlier cases dealing with declarations in disparagement of title is due in part at least to the change of view indicated above; and *Carpenter v. Hollister*, *supra*, as an authority, must be read with this change in mind. What it decided was that an admission tending to impeach the deed relied upon to vest title in defendant's predecessor was not admissible because of the parol evidence rule. We have no occasion at present to inquire as to the soundness of that holding, since here there can be no doubt that the issues relating to title were provable by parol evidence. This being so the admission of the Woodward's was properly received against the defendants.

The defendants excepted to the findings because the chancellor admitted evidence to the effect that Charles H. Woodward was a careful and prudent man. But the evidence was not received under exception; hence, the exception to the findings is without merit.

The defendants excepted to the findings on the ground that

the chancellor erred in admitting in evidence the grand list books of the town of Royalton for the period during which the plaintiff and his father owned the premises, the objection being that the books were incompetent to establish any material issue in the case. But when it is material to show who paid the taxes on the premises in question the grand list books showing to whom they were listed for taxation are competent evidence. *Carter v. Clark*, 92 Me. 225, 42 Atl. 398; *Pasley v. Richardson*, 119 N. C. 449, 26 S. E. 32. See *Ripton v. Brandon*, 80 Vt. 234, 67 Atl. 541.

It will simplify the consideration of a further objection to this evidence, and as well some of the exceptions that will follow, to notice at this point some additional facts relating to the title, and to consider in a general way the rules of law applicable when the defence of adverse possession is relied upon by one sustaining the relation of a tenant in common.

In the spring of 1889 Dudley C. Denison and Charles H. Woodward became joint owners of the Lyman farm in the following manner: The title to an undivided half of said farm then stood in the estate of one Marcy under a decree of foreclosure that had become absolute against Lyman, Denison and one Charles Belknap. The title of the other half was involved in foreclosure proceedings brought by said Belknap against Denison whose interest was that of a second mortgagee. Belknap had acquired a first mortgage on this half of the farm and also held a quitclaim from the mortgagors of their equity of redemption. Denison was claiming that Belknap's mortgage interest became merged in the equitable estate conveyed to him by the mortgagors, leaving his (Denison's) mortgage the first to be satisfied. At the February Term, 1889, of this Court for Windsor County it was decided that Belknap's mortgage was not merged in his equitable estate and a decree of foreclosure passed against Denison to become absolute March 1, 1889. *Belknap v. Denison*, 61 Vt. 520, 17 Atl. 738. On February 18, 1889, Woodward took a quitclaim deed of Belknap's interest for the expressed consideration of \$850. On March 30, 1889, Denison acquired title to the portion of the premises held by Marcy's estate, and on December 21, 1889, he conveyed the whole of said farm to plaintiff's father by warranty deed containing the usual covenants. The deed was the same day filed and recorded in the land records of the town of Royalton, and Waterman immediately went into possession.

Nothing to the contrary appearing, it will be presumed that the entry was under his deed from Denison.

The nature of Waterman's entry has an important bearing upon his acts in possession. It cannot be questioned that one tenant in common may acquire title by adverse possession against his co-tenant; but this presupposes an ouster, otherwise the possession of one is, in law, the possession of both. *Owen v. Foster*, 13 Vt. 263.

In determining whether certain acts of one joint owner are evidence of an ouster and possession adverse to another joint owner, much depends upon the circumstances of the entry. There is an important distinction between the case where a tenant in common, entering or being in possession as such, subsequently asserts a claim adverse to his co-tenant, and the case where the entry is accompanied by such adverse claim.

Where an ouster is asserted by one who has held possession for or with his co-tenant the presumptions are against him and can only be overcome by some overt and notorious act or acts of an unequivocal character, indicating an assertion of ownership of the entire premises to the exclusion of the right of the co-tenant. *Ball v. Palmer*, 81 Ill. 370; *Katz v. Belz*, 178 Ill. 434, 53 N. E. 367. In such case the position of one tenant in common toward his co-tenant is, with respect to adverse possession, somewhat analogous to that of a tenant toward his landlord. *Chandler v. Ricker*, 49 Vt. 128.

But the situation is entirely different when the entry is not in subordination to the common title. Then the joint owner does not enter as a tenant in common. If he enters under a deed purporting to convey the whole premises, he is presumed to have entered under a claim of right to the whole; in other words, to have entered under the title which his deed upon its face purports to convey. *Joyce v. Dyer*, 189 Mass. 64, 75 N. E. 81, 189 Am. St. Rep. 603. See *Chandler v. Ricker*, 49 Vt. 128, 133. There is little if any dissent from the proposition that when a tenant in common conveys to a stranger to the title by a conveyance appropriate in form to transfer an estate in severalty and the grantee enters into exclusive possession of the premises thereunder as a claimant in severalty, this is an ouster of the other co-tenants of which they must take notice and which, if sufficiently long continued, bars them of all right in the property. Note, 109 Am. St. Rep. 612; see *Whitney v. French*, 25 Vt. 663,

667. When an ouster has been established, whether the subsequent possession is of a character to ripen into title, depends upon the same facts as in a case of adverse possession where the question of co-tenancy is not involved.

Denison's conveyance to Robert Waterman of the whole farm by warranty deed, with Waterman's entry thereunder claiming title to the whole, and notice to Woodward of such claim, would work an ouster of Woodward and lay the foundation for acquiring title to the whole farm by adverse possession. *Roberts v. Morgan*, 30 Vt. 319, 325; *Holley v. Hawley*, 39 Vt. 525, 532, 94 Am. Dec. 350; *Kirley v. Mayo*, 13 Vt. 103.

It was further urged against the admissibility of the grand list books that the mere payment of taxes by one co-tenant in possession was not evidence of an ouster. The evidence was certainly admissible on the issue as to a presumptive grant. Woodward's failure to pay the taxes and their payment by Waterman would be circumstances tending to support such a claim. *Holtzman v. Douglas*, 168 U. S. 278, 42 L. ed. 466, 18 Sup. Ct. 65. And in the circumstances of this case the evidence was admissible on the issue of adverse possession. Such evidence is generally admissible on this issue, not as an act of possession but as evidence of a claim of title. *Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95; *Paine v. Hutchins*, 49 Vt. 314. When the taxes are paid by the actual occupant of the land it is some evidence of the adverse character of the occupancy. *Miller v. Mullen*, 95 Me. 400, 49 Atl. 871; *Daly v. Lewiston & Auburn Children's Home*, 113 Me. 526, 95 Atl. 219. And if continued over a long period unexplained, it affords strong evidence that the possession was under a claim of right and adverse. *Holtzman v. Douglas*, *supra*; *Fletcher v. Fuller*, 120 U. S. 534, 30 L. ed. 759, 7 Sup. Ct. 667. Where the payer is a tenant in common it would not alone show an ouster and might not have such a tendency, the presumption being that in so doing he acts for himself and his co-tenant. *Downer's Adm'r v. Smith*, 38 Vt. 464. But the fact of an ouster having been otherwise established, as in this case, the evidence would be admissible as tending to characterize the subsequent possession.

The defendants' forty-second and forty-third exceptions, which are briefed together, relate to evidence of the friendly and confidential relations existing between Denison and his son-in-law. It was objected that the evidence was immaterial

and had no legitimate tendency to establish any of plaintiff's claims. The only case cited in support of these exceptions is *Heileg v. Dumas*, 65 N. C. 214, where evidence of the friendly feelings existing between two of the joint obligors of a bond, offered for the purpose of proving that one of them, who denied the fact, signed the bond, was held inadmissible on the ground of remoteness. We think that evidence that the relations between Denison and Woodward at the time in question were "very friendly" and "perfectly confidential" would tend to make more probable plaintiff's claim that when Woodward took his deed in the circumstances detailed above, he was acting in Denison's interest, and with the other circumstances in the case tends to support the presumption of a grant. *Comstock's Adm'r v. Jacobs*, 86 Vt. 182, 84 Atl. 568; *Camp v. Page*, 42 Vt. 739; *Kimball v. Locke*, 31 Vt. 683.

The evidence was not as matter of law too remote to be admissible; so, as against the objection of remoteness, its admission would be in the discretion of the trier. *Green v. LaClair*, 89 Vt. 346, 95 Atl. 499.

This brings us to the consideration of the exceptions to the chancellor's findings. Defendants excepted to the failure of the chancellor to find and report in accordance with a request that, in the event of a finding that any owner or occupant of the premises now owned by the defendant Abbie E., sought or obtained permission to use the way in question, the evidence or other basis of such finding be reported, on the ground that it was essential to the support of the finding of permission granted that the time and details of the transaction be made to appear. But the burden was on the defendants to show that the use of the way was adverse, and on this question the chancellor finds: "The defendants answer that they have a way by prescription. I am unable to find for them on this claim, but incline to the opinion that the use of the way was permissive and not under claim of right." Besides, in any event it was not reversible error for the chancellor to omit to find in accordance with this request. *In re Bugbee's Will*, 102 Atl. 484; *Allen's Adm'r v. Allen's Adm'r*, 79 Vt. 173, 186, 64 Atl. 1110. When the chancellor is sitting as trier of the facts it is for him to say, in the exercise of a sound discretion, when and how far the subordinate facts on which he rests his ultimate findings shall be reported. Lest this statement should be misunderstood, it may be well to

add that if the evidence to support a finding made is not sufficient, or if the supporting evidence is not admissible, or, again, if a material finding which the evidence compels is denied, the rights of the party aggrieved can be protected by proper exceptions. The proceedings in this regard are similar to those when the trial is by a special master. *Rowley v. Shepardson*, 90 Vt. 25, 32, 96 Atl. 374. If an exception is taken which necessitates an examination of the evidence by this Court, it would be the duty of the chancellor to send up such portions thereof as the circumstances require, when the party against whom the decision is so requests in writing. P. S. 1265.

Defendants' ninth request was of the same character and what we have already said disposes of the exception to its refusal. In neither case is it suggested that there was no evidence to support the finding upon which the request was dependent.

Three of defendants' exceptions to the findings relate to the matter of taxes. The chancellor found that the Watermans paid the taxes on the Lyman farm ever after their purchase in 1889, a period of 26 years, and that Charles H. Woodward paid no taxes thereon, nor was the farm listed to him. It is claimed there was no evidence to support these findings. What we have already said concerning the exception to the admission of the grand list books is an answer to this objection. Manifestly the books showed that the land was not listed to Woodward for taxation but was listed to the Watermans. Nothing further appearing, the natural inference would be that the Watermans, and not Woodward, paid the taxes.

The defendants excepted to the statement in the findings that Charles H. Woodward "must have passed by the farm frequently," as unsupported by the evidence. True, there was no direct evidence as to this matter; but the farm was on the main road from Royalton to Bethel and only about four miles from Woodward's place of business. He was a hotel keeper and livery man. The probability that he passed the farm frequently would be strong, and that is all that the chancellor's statement amounts to. Whether he did or not would, in the circumstances, be of little moment.

The defendants excepted to the findings that Woodward "had no claim against Denison's estate" on the ground that it is not supported by the evidence and is wholly immaterial. If the finding was immaterial, the defendants would not be prej-

udiced, as it can be rejected without disturbing the decree. If, as the defendants say in their brief, the fact made weight for them, we cannot presume that the chancellor made an improper use of it in determining the ultimate questions for decision. It was supported by the evidence, for from the records of the probate court showing the settlement of Denison's estate, it appeared that Woodward presented no claim. The finding means no more than this; as the chancellor concludes the finding excepted to with, "as appears by the records of the probate court."

The defendants excepted to the finding that there was some arrangement between Charles H. Woodward and Denison whereby Denison became the owner of said farm prior to his conveyance to Robert Waterman, on the ground that there was no evidence sustaining the finding. This is a fragment of the chancellor's finding relating to a presumptive grant. It continues: "Whether a deed was given and lost, or given and not recorded, or whether the parties failed to have the deed drawn and executed, I cannot find from any facts before me."

It is not necessary to support the presumption of a grant that the trier should believe and find that a conveyance was in fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its non-execution. *Fletcher v. Fuller*, 120 U. S. 534, 30 L. ed. 759, 763, 7 Sup. Ct. 667; *Trustees Cal. Co. Gr. Sch. v. Howard*, 84 Vt. 1, 11, 77 Atl. 877; *Townsend v. Downer's Est.*, 32 Vt. 183. It was said in *Edson v. Munsell*, 10 Allen (Mass.) 557, that the presumption is not founded on a belief that the grant has actually been made in a particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time and the policy of not disturbing long-continued possession. To the same effect is *Tracy v. Atherton*, 36 Vt. 503, 511.

Though a presumption of a deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet when no such facts are shown, and the things done and the things omitted with regard to the property in controversy by the respective parties for long periods of time after the supposed execution of the conveyance can be explained satisfactorily only upon the hypothesis of its existence, then the trier would be at liberty to presume a conveyance and thus quiet the possession.

Fletcher v. Fuller, supra. When the actual execution of a deed is established nothing further would be required than proof of its contents and there would be no occasion for the exercise of any presumption on the subject. It must then be evident that the presumption is indulged only when there is uncertainty as to whether the grant has actually been made. It is enough to say that the circumstances detailed by the chancellor on which he bases his findings as to a grant, many of which have been referred to in this opinion, make a typical case for presuming a conveyance.

The defendants excepted to the finding that there was an ouster of Woodward, on the ground that there was no evidence tending to establish the fact. But, as we have seen, Denison's deed to Waterman of the whole farm and possession thereunder claiming title to the whole, coupled with notice to Woodward, affords a sufficient basis for the finding.

It was further objected that the finding was inconsistent with that of some sort of an arrangement between Woodward and Denison whereby the latter became the owner of the whole farm. The chancellor's findings in this regard are evidently in the alternative. Immediately following the finding as to a lost grant quoted above he says: "But I do find beyond any reasonable doubt that there was an ouster of Woodward and that he must have had knowledge at the time the plaintiff's father took possession of the farm of his exclusive ownership therein and of acts such as would be inconsistent with and in exclusion of the continuing rights of Woodward and such as would amount to an ouster as between landlord and tenant."

What the chancellor says amounts to saying if there was no such conveyance there was at least an ouster of Woodward such as would predicate the claim of adverse possession. The evidence afforded a sufficient basis for the presumption of a grant, but it was in the circumstances for the trier to find. If he was not satisfied, from the evidence, to presume the grant, it still supported plaintiff's claim of adverse possession. The defendants say that it is not shown that Woodward had notice that the Watermans were claiming adversely. But there was ample evidence to afford the basis of such an inference and nothing more is required. It is sufficient that the acts of adverse possession were such in their character and attending circumstances that a man reasonably attentive to his own interests would have known

that an adverse right was being asserted. Note, 109 Am. St. Rep. 626.

This disposes of defendants' further exception to the finding that Woodward must have known at the time plaintiff's father took possession of the farm that his claim of ownership was adverse.

The defendants excepted to the statement in the findings that Woodward had knowledge of acts of plaintiff's father "such as would be inconsistent with and in exclusion of the continuing rights of Woodward and such as would amount to an ouster as between landlord and tenant," on the ground that the statement is but a conclusion of law and not a finding of fact, and especially on the ground that no finding is made as to what the "acts" referred to were. The statement was a conclusion, but it was based upon facts and circumstances which the chancellor had detailed; and the conclusion, whether of law or of fact, was amply supported by the facts already found.

Several other exceptions to the findings were saved, but they are either sufficiently covered by what has already been said or are too plainly without merit to require special attention. The record discloses no ground of reversible error and the defendants' exceptions were properly overruled.

The defendants argue that they are entitled to a decree on both branches of the case. But their argument is predicated on the assumption that inadmissible evidence was received and that many of the findings were unsupported. They do not claim that on the findings made, there should be a different decree.

Decree affirmed and cause remanded.

ON MOTION FOR REARGUMENT.

After the foregoing opinion was handed down counsel for the defendants had leave to file a motion for reargument, pending which the mandate has been withheld. The motion brings to our attention no matters not already fully considered.

It is asserted that the question argued concerning the testimony of Robert Waterman was raised by the exception taken. But not so, as an examination of the transcript will show. The defendants excepted to the findings because the testimony in question was received, on the ground stated in opposition on

certain specified pages of the transcript. Therefrom it appears that it being offered to show by the witness in substance that directly after he bought the Lyman farm Mrs. Fay came to him and asked permission to use the way to get wood in the winter time, defendants objected on the ground that it did not appear that she had any authority from her husband to make the request—that it would not be evidence against him—and “that it was not in the line of demands characterizing possession.” Thereupon it was made to appear that Mr. Fay had died shortly before the request was made; and the chancellor admitted the evidence and gave the defendants an exception, though none was asked. No other objection was made nor exception taken.

Whether the testimony to the effect that Charles H. Woodward was a careful business man was or was not received under exception, depends upon the construction which should be given to the record, having in mind that all intendments are against the exceptor. The exception sought to be saved related to the testimony of one Harrington and the ground of the exception, filed was that the testimony was incompetent. We quote from the transcript so far as material to this question:

“Q. I’ll ask you now, from your knowledge and experience with Mr. Woodward what kind of a business man he was?

Batchelder: Object to that question.

Court: Take his answer and note an exception.

A. I should say that he was a man that would look after his business pretty close.

Batchelder: Move the answer be stricken out.

Court: Well, it may not be responsive. Do you think it is responsive?

Wilson: Oh no. I asked whether he was a careful business man or not.

Court: What do you say to that, Mr. Harrington?

A. I should say he was.”

Counsel’s reply to the chancellor’s question evidently referred to what he desired to show, for no such question had been asked. The objection interposed, being general, may as well have been to the form of the question as to subject matter. Applied to the question objected to, the answer complained of would be meaningless and the question which elicited their answer was not objected to. In this situation it is not to be inferred that

the exception noted was any broader than its terms would indicate. Such was and is our construction of the record.

But if the question argued had been raised, it would not avail. That Mr. Woodward was a careful business man would be a circumstance to be considered with the other circumstances in the case on the issue of a presumptive grant.

It would not seem that the third ground of the motion can be seriously entertained. The complaint is that in disposing of the exception to the admission of the grand list books the Court has sustained the ruling below on a ground not argued by the plaintiff and as to which defendants have had no opportunity to be heard. It not infrequently happens that reasons for sustaining a ruling exist that are not advanced in argument; and to reopen the argument merely to give counsel an opportunity to debate a matter which the Court on deliberation has found decisive of the question, when, as here, no error is pointed out, would, to say the least, be a novel proceeding.

The defendants' brief in support of the motion is largely devoted to the fourth ground. As to this, the defendants misconceive the opinion as well as the bearing of our earlier cases on the question for decision. The holding of the opinion is, that the deed of the whole farm to plaintiff's father with entry thereunder claiming the whole *and notice to Woodward of the claim* operated to effect an ouster. It is not held that placing the deed on record would be constructive notice of an adverse claim nor that mere knowledge of the conveyance would be sufficient notice of such claim. The opinion is consistent with the rule that either actual notice, or circumstances from which notice will be presumed, is required. The cases referred to go no further than this and are in harmony with our present holding.

Motion overruled.

COOK & NORTON v. TOWN OF SUTTON.

October Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 19, 1917.

*Tax Collector—Implied Authority—Suit on Behalf of Town—
Findings of Fact—Suit Against Town for Legal Services
Secured by Tax Collector—Estoppel.*

A collector of taxes has implied authority to secure legal advice in the discharge of his duties, at the expense of the town.

A collector of taxes has no implied authority, under P. S. 646, as amended by No. 52, Acts 1910, to institute a suit on behalf of the town, and an attorney, employed by him for this purpose, is bound to know the extent and limitations of the collector's authority in the matter, and to act accordingly.

In an action against a town to recover for legal services rendered, a finding that the employment of plaintiffs by the tax collector to institute a suit to collect a tax was not ratified by the selectmen or the town agent is not inconsistent with evidence that the town agent, one of the selectmen, and the collector called at plaintiffs' office, after the suit had been brought, talked over the matter, without suggesting that plaintiffs had not been properly employed, or that they disapproved or were dissatisfied with what had been done, and told plaintiffs that they would later make up their minds and advise them what they should decide to do.

In such case, the town was not estopped to deny liability, none of the items sued for having accrued after the conference between plaintiffs and the town officers.

In such case, plaintiffs were not entitled to recover for a consultation between them and the tax collector, the town agent and one of the selectmen with regard to the advisability of pressing the suit previously commenced by plaintiffs on behalf of the town, it not being claimed that the item was a proper charge against the town on account of the tax collector, and, under the circumstances, there being no necessary inference that it was so chargeable on account of the other officers present.

CONTRACT. Plea, the general issue. Trial by the Caledonia County Municipal Court, *George C. Frye*, Judge. Judgment on facts found by the court, for defendant. Plaintiffs excepted. The opinion states the case.

Cook & Norton for plaintiffs.

• *Porter, Witters & Harvey* for defendant.

TAYLOR, J. The action is contract to recover for services as attorneys and for cash paid out. The trial was by the court with judgment for the defendant. The plaintiffs excepted to the judgment and to a certain finding of the court which will more fully appear. The principal items of plaintiffs' claim relate to a trustee suit brought by them in the name of the defendant against one Charles B. Joy, a taxpayer of said town. The suit was prosecuted at the direction of the collector of taxes without the knowledge of, or authority from, the selectmen or the agent to prosecute and defend suits in which the town is interested. The remaining items are for advice to the collector, \$5.00, and consultation with town officers, \$1.00. It was conceded at the trial that plaintiffs' charges were reasonable and proper, if recoverable of the defendant, and the only question litigated was the town's liability.

Plaintiffs treat the two items mentioned above as in a class by themselves and say that, on the findings, they were entitled to recover at least to that extent. Regarding the first item the court found that the tax collector of the defendant town consulted the plaintiffs in regard to the liability of said Joy on an unpaid tax due the town and as to the advisability of bringing a suit against him; that the consultation was without the authority or knowledge of the selectmen or town agent; that the services were rendered the collector and were incidental to and a part of the proceedings to collect the tax of Joy by suit; and that as a result of the consultation the suit in question was subsequently brought.

The liability of the town on account of this item depends upon the authority of its collector of taxes to secure legal advice in the discharge of his duties at the charge of the town. That such authority on the part of town officers may in some circumstances be implied was determined in *Burton v. Norwich*, 34

Vt. 345, where the rule was applied to overseers of the poor and within certain limits, to town grand jurors. See *Bridgman v. Grafton*, 51 Vt. 478. The reasons assigned in *Burton v. Norwich* for holding that the officers there involved have implied authority to take legal advice in their departments of town affairs at the charge of the town apply with equal force to the collector of taxes. He is charged with duties in which the town has a direct pecuniary interest. His duties are exacting and in their discharge he is liable to be confronted with perplexing questions affecting the legality of his actions. The difficulties of enforcing even a valid tax against a recalcitrant taxpayer are numerous and well understood. In view of these difficulties, to say nothing of the liability of the town to respond in damages for the collector's default, or where the legality of the tax or of the taxbill or warrant is called in question, it becomes apparent that the collector must have an opportunity to secure necessary legal advice. We think it should be held that, in the absence of some other suitable provision for such advice, the collector has implied authority to secure it himself at the expense of the town. Nor is the right affected by the fact that the statute now makes it discretionary with the town agent to proceed to enforce the tax by trustee process. His duties relate to the commencement and prosecution of the suit and not to legal advice, though relating to a matter which may ultimately be involved in a suit. *Burton v. Norwich, supra*. The fact that the town agent may determine whether the suit shall be commenced and may employ counsel, if required, to manage the litigation does not wholly relieve the collector of responsibility nor obviate the necessity or propriety of his taking legal advice in all circumstances. The statute devolves upon him the duty of setting in motion the machinery for the collection of taxes by trustee process by bringing the matter to the attention of the town agent, and he would naturally be charged with making the necessary investigation preliminary to the bringing of the suit.

Some of the circumstances necessary to imply authority on the part of town officers to secure legal services at public expense are indicated in *Gibson & Waterman v. Vernon*, 90 Vt. 160, 97 Atl. 356, where we held that license commissioners do not sustain such relations to the town as entitle them to employ counsel at the expense of the town.

From what we have already said it will be evident that the finding that the advice was incidental to and a part of the proceedings to collect the tax by suit is not controlling. Besides, the scope of the finding is limited by reference to the testimony on which it was based, which was no more than that the collector consulted with plaintiffs in reference to Joy's taxes.

With reference to the principal items of plaintiffs' specification the claim is made that the collector had a right to direct the bringing of the suit; that it could be instituted by him personally or the matter could be turned over to the town agent for action. We cannot agree with this contention. P. S. 646, as amended by No. 52, Acts of 1910, provides that whenever the collector of taxes has a delinquent tax in his hands for collection he may notify the agent or other officer whose duty it is to prosecute and defend suits in which the municipality is interested, of the amount of such tax and all fees accrued thereon, who is empowered, in his discretion, to institute suit therefor by trustee process in the name of the municipality. Prior to the amendment of 1910 the collector had authority to institute such suits, but in his own name. It is evident that when the legislature relieved the collector of the responsibility of maintaining the suit and cast it upon the town it intended to protect the latter's interests by resting the authority to commence, prosecute or terminate the suit in its law agent. The findings exclude any authority, express or implied, derived from the selection or the town agent, and the collector had no implied authority under the statute. While plaintiffs acted in entire good faith, they were bound to know the extent and limitations of the collector's authority in the premises and to act accordingly. *New Haven v. Weston*, 87 Vt. 7, 14, 86 Atl. 996, 46 L. R. A. (N. S.) 921.

But it is urged that the selectmen and town agent subsequently ratified the action of the collector and this was one of the issues at the trial. The court found that there was no ratification by the selectmen or town agent of plaintiffs' hiring; that no instructions were given by either with reference to the prosecution of the suit; and that there was no promise to repay the cash paid out. Plaintiffs excepted to the finding that there was no ratification or agreement to pay by the selectmen and town agent as being inconsistent with the further finding that the court "believed the entire testimony of witness E. A. Cook to be

true." We will now consider the exception to the finding, which for convenience of treatment has been deferred until this time.

The occasion to which these findings relate was an interview on March 23, 1916, after all the charges had accrued except that of one dollar for consultation with town officers. At plaintiffs' request the town agent and one of the selectmen met the collector at plaintiffs' office and "talked over" with them the matter of the suit against Joy. The testimony of Mr. Cook referred to above, so far as it bears on the question, was to the effect that there was no suggestion on the part of anyone that plaintiffs had not been properly employed or that they disapproved of the suit or were in any way dissatisfied with what had been done; that he informed them as to what he had discovered about the tax books and showed them the answer made by Joy's attorneys in the tax suit; that it was left undecided whether they would discontinue the suit and "pay the bills" or proceed with it, as to which they would make up their minds later; that he made them an offer to discount all charges for services and demand only items of cash paid out, if it should seem best to discontinue the suit; and that as they left they said they would make up their minds within a few days and let plaintiffs know which they decided to do. In this connection it appeared that on April 14, 1916, plaintiffs were given notice in writing signed by all of the selectmen and by the town agent that the suit was instituted without their knowledge or consent and that the town would not be responsible for plaintiffs' services and the expenses incurred in prosecuting the suit.

It is urged that in view of what transpired at the conference the town should be estopped from denying liability; but the law of estoppel would not apply, as none of the items sued for accrued after that date. Nor can it be said that the finding that there was no ratification was inconsistent with Mr. Cook's testimony. All that he said on that subject could have been true without an actual ratification, which presented a question of fact to be inferred by the trier from all the evidence in the case. It is specially urged that the finding that no promise was made to repay the cash paid out was inconsistent with Mr. Cook's testimony. But he did not testify to a promise to pay,—did not undertake to tell what was said by the officers. At most his testimony on that subject was a conclusion and does not afford a sufficient basis for rejecting the court's finding that on all the

evidence there was no such promise. As the questioned finding must stand, plaintiffs fail in their claim that there was a binding ratification.

There remains for consideration the charge of one dollar for consultation with town officers. This the court finds was a charge for the consultation of March 23, 1916, between plaintiffs, the tax collector, the town agent and one of the selectmen.

The interview was not sought by the selectmen and town agent. There was a complete explanation of all matters in relation to the suit and plaintiffs advised as to the legality of the taxes assessed by the defendant town; but the court finds that this advice was "incidental to the suit." It fairly appears that the interview related to the advisability of pressing the suit. It is not claimed that the item was a proper charge against the town on account of the tax collector; nor, in the circumstances, is there a necessary inference that it was so chargeable on account of the other officers present. It follows that we cannot disturb the action of the court in rejecting it.

For error in disallowing the charge for advice to the collector the judgment will have to be reversed. No question as to costs has been made.

Judgment reversed, and judgment for plaintiffs to recover five dollars damages and their taxable costs.

DEXTER & CARPENTER, INC. v. FILLMORE & SLADE.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 12, 1918.

Sales of Personal Property—Contract Price.

Under a contract for the sale of personal property the vendees are by law bound to pay the contract price, and their expectation, when they received the property, that the price would be less does not affect the vendor's rights in the matter.

In an action in contract to recover for two carloads of coal sold and delivered by plaintiff to defendants, it was not error to instruct the jury that if the coal was received and used by defendants after they received a letter from plaintiff in which it stated the price per ton, the defendants were bound to pay that sum per ton as the contract price.

ASSUMPSIT, in the common counts. Plea, the general issue. Trial by jury at the June Term, 1917, Bennington County, *Slack*, J., presiding. Verdict for plaintiff. Defendants excepted. The opinion states the case.

Holden & Healey for defendants.

Collins M. Graves for plaintiff.

If a person sending or delivering goods names a price, and the one to whom they are delivered accepts the goods and deals with them as his own, a sale for the price named is implied. 35 Cyc. 59; *Yeager Milling Co. v. Brown*, 128 Mass. 171; *Boughton v. Standish*, 48 Vt. 594; *Barnes v. Shoemaker*, 112 Ind. 512, 14 N. E. 367.

WATSON, C. J. The only question in dispute in this case is the price per ton to be paid for two carloads of coal received by the defendants from the plaintiff, the latter contending it was to be six dollars, and the former that it was to be five dollars.

It appeared that on November 14, 1916, the plaintiff sold to defendants two cars of coal which it then stated were at or near Rotterdam Junction, New York, for the price of six dollars and fifty cents per ton. The plaintiff, at that time, gave defendants the numbers of said two cars and agreed to deliver the cars to the defendants. Immediately on the same day the plaintiff instructed the agent of the railroad at that place to forward those two cars of coal to the defendants, but they were never delivered. No claim was made by either party at the trial of this case that the defendants had at any time purchased of the plaintiff any coal except the two cars mentioned. Defendant Slade testified that during the negotiations for this coal, the plaintiff offered bituminous coal at the mines at five dollars a ton, and that in response to such offer he told the plaintiff that they could not use any of that coal, and besides the price was too high.

Nothing thereafter took place between the parties until November 22, following, when the invoice of another car of coal was sent by the plaintiff to the defendants with the price therein stated to be six dollars per ton; and on the 27th of the same month an invoice of still another and different car of coal was sent with the same price per ton stated therein. Both invoices were received by the defendants before the arrival of the cars to which they related. The evidence showed that the car referred to in the invoice of November 22, was shipped from the mines November 24, and the car invoiced November 27 was shipped from the mines the day it was invoiced, both consigned to the defendants. On November 28, defendants wrote the plaintiff that these cars were not shipped so as to be considered "quick coal" and must apply as coal from the mines, taking the price of five dollars per ton. Following the receipt of this letter, the plaintiff, on November 29, wrote the defendants that it would be impossible to make the price five dollars per ton, but would make it six dollars. This letter was received by defendants before the arrival of the coal. These two cars of coal were received and accepted by the defendants some time in December, 1916; and the parties had no further communication with each other until after the defendants had used the coal.

Defendant Slade, when testifying for the defence, was asked in direct examination if this coal was received under the expectation that five dollars per ton would be the price. Objection being made, the evidence was excluded and exception saved. In this ruling, there was no error. The defendants were by law bound to pay the contract price; and their expectation, when they received the coal, that the price would be less, does not affect the plaintiff's rights in the matter.

Defendants excepted to the charge that (in effect) if the coal was received and used by the defendants after they received the plaintiff's letter of November 29, in which the price was stated to be six dollars per ton, the defendants are bound to pay that sum per ton as the contract price. This exception is without force. It seems from defendants' own showing that on November 14, the time when the plaintiff offered to let them have coal at the mines for five dollars a ton, the offer was at once rejected by them. So if this offer was ever made, (which was denied by plaintiff,) its immediate rejection ended it. It had no connection with the later proposition to let the defendants

have the two cars of coal which they received and used, at six dollars per ton. The latter was an independent matter. When defendants received this coal they knew it was not the coal first contracted for by them, and they knew the plaintiff's price for it. By accepting and using the coal, defendants bound themselves to pay the price which they knew the plaintiff asked for it. *Dennis v. Stoughton*, 55 Vt. 371.

It is urged that the price of the coal was a question for the jury. But this is not so. The price was exclusively fixed in the invoices and in the letter of November 29. The defendants' acceptance thereof was by their unequivocal acts of receiving and using the coal, with full knowledge of the plaintiff's price therefor. It was a question of law for the court.

Judgment affirmed.

FRANK B. POPE v. CATHERINE G. HOGAN, GIDEON GAGNE AND
MARGARET H. GAGNE.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, and TAYLOR, JJ.

Opinion filed February 12, 1918.

*Witnesses—Competency—P. S. 1589, as Amended—Evidence—
Parol Gift of Land—Statute of Frauds—Entry and Posses-
sion—Intention of Donee—Adverse Possession—Notice—
Error in Exclusion of Evidence—When not Cured—Decla-
rations Against Title—When Admissible as Between Joint
Owners of Real Estate—Tenants by Entireties—Evidence
—Admissibility—Burden of Proof.*

A wife is a competent witness to testify to a gift to her husband, after the death of the donor, as she is not a party to the contract in issue and on trial within the meaning of P. S. 1589, as amended by No. 85, Acts 1910.

It is the death of a sole party to a contract, or, if more than one, the death of all, that operates to exclude the other party from testify-

ing in his own favor, under P. S. 1589, as amended by No. 85, Acts 1910.

Where it is not sought to enforce a contract respecting real estate, but only to show possession of land as affecting the acquisition of title by adverse possession, evidence of a parol gift of land is not inadmissible under the Statute of Frauds, because, while such a gift conveys no title and creates only a tenancy at will, it may ripen into a perfect title by adverse possession.

A gift of land by parol, accompanied by an actual entry and possession, manifests the donee's intention to enter and take as owner and not as tenant.

Where an entry upon land is in subordination to the title of another, to give the possession an adverse character, either actual notice of an adverse claim must be brought home to the owner, or some overt, notorious and unequivocal act or acts indicating a disavowal of his title of such a character that notice would be presumed, must be shown.

In an action of ejectment, error in the exclusion of evidence, offered by defendants, of a parol gift of the land to their predecessor in title, as a basis for their claim of adverse possession, is not cured by giving defendants opportunity to show such fact on surrebuttal to meet plaintiff's evidence that he was in possession under a lease.

A declaration against title, made by one tenant by the entirety, while in the presence and hearing of the other, is admissible against such other, and her privies in title.

The statements of a husband or wife in the nature of declarations of a grantor or possessor of property are admissible against the other spouse if they satisfy the requirements as to the admissibility of similar statements of parties not husband and wife.

Statements of a joint owner of real estate not made in the presence and hearing of the other owners, are receivable in evidence against the other owners if there exists an identity of legal interest, not merely a community of interest, between them.

The legal interest of a husband and wife as tenants by entireties is not identical, because the husband has, in addition to his joint interest, a freehold interest during the joint lives of himself and his wife, by which he takes the possession and usufruct of the whole as marital rights, and the wife has no control over or interest in the property, except the rights of homestead (if there be one) and survivorship; and so an admission against title made by one, not in the presence

and hearing of the other is not receivable in evidence against such other.

In an action of ejectment it was not error to exclude evidence that after the death of one through whose alleged title by adverse possession defendants claimed title, his wife, who was one of the defendants, attempted to borrow money to pay the taxes, declaring that she owned the premises; because she was not seeking to tack her title to that of her husband, but stood on a title perfected by adverse possession before her husband's death.

In an action of ejectment, where defendants introduced evidence of a parol gift to their predecessor in title, since deceased, as the basis of a title by adverse possession, it was not error to permit one of the claimed donors to testify that defendants' predecessor in title occupied under a lease, and not by gift; because, although the witness was a party to a claimed contract and the other party was dead, she was competent to give evidence to meet and explain the testimony as to the gift, and the legitimate inferences deducible therefrom.

Where defendants in an action of ejectment claimed under a title by adverse possession based upon a parol gift to their predecessors in title, the burden of proof upon the question of adverse possession, as distinguished from the burden of evidence, was upon defendants, aided by the presumption that, if there was a gift of the property, their predecessor in title occupied thereunder claiming ownership.

EJECTMENT. Trial by jury at the December Term, 1916, Bennington County, *Miles, J.*, presiding. Verdict for plaintiff. Defendants excepted. The opinion states the case.

J. K. Batchelder for defendants.

Holden & Healy and *F. C. Archibald* for plaintiff.

TAYLOR, J. The action is ejectment and the premises in question are a portion of a tract of land with two dwelling houses thereon formerly owned by Patrick Hogan and his wife Ellen as tenants by entireties. They had acquired title to the whole as early as 1879 and lived for many years thereafter in the southerly dwelling house. The defendant Catherine G. Hogan is the widow of John Hogan, a son of Patrick and Ellen, and was in possession of the northerly dwelling house at

the time this suit was brought. John Hogan died in July, 1907. In November, 1913, Patrick and Ellen Hogan conveyed the whole tract by quit-claim deed to Patrick Hogan, Jr., and Catherine Durbin, their only living children, excepting and reserving to themselves and to the survivor the use, occupancy, control, rents and income thereof during their joint lives and the life of the survivor. Patrick Hogan died in November, 1915. April 24, 1916, Ellen Hogan joined with said children in a conveyance of the whole tract to the plaintiff. Such is the title under which the plaintiff claims.

The defendants claim title to the northerly dwelling house and adjacent land through John Hogan by adverse possession. Their claim is that early in 1883 Patrick and Ellen gave the northerly house and lot with definite boundaries to John; that he immediately went into possession and lived there with his family until his death, more than 24 years; and that during all that time he claimed to be the owner of the premises and had full control and open, notorious and continuous possession thereof. The trial was by jury with verdict for the plaintiff. Most of the defendants' exceptions relate to evidence offered in support of their claim of title. Several of the exceptions raise questions of the admissibility of parol evidence of the gift, the competency of Catherine Hogan as a witness thereto, and the admissibility of various statements of Patrick and Ellen in the nature of admissions that John was the owner of the property. These exceptions are so related that, in the main, they do not require separate treatment.

The substance of the evidence offered and excluded concerning a gift was that both Patrick and Ellen gave the place to John as his own; that just before he moved onto the premises Patrick called at the tenement where John was then living and had a talk which resulted in Patrick's giving him the place; that the same day John moved his family into the house; and that later the same day Ellen called and in effect reaffirmed what Patrick had said. It was offered to show these conversations by Catherine Hogan. Plaintiff objected that she was incompetent under P. S. 1589, as amended by No. 85, Acts of 1910. It is argued that in legal contemplation the husband and wife are one; and that, though the claimed gift was to John, Catherine would be a party to the contract and so disqualified by the statute from testifying. But she was not the donee and had only an inchoate

interest in the subject of the gift. Clearly she was not a party to a contract "in issue and on trial" within the meaning of the disqualifying statute. However, assuming that she was a party, still she would not be an incompetent witness. Ellen Hogan, one of the "other party" was still living. It was held in *Dawson, Adm'r v. Wait*, 41 Vt. 626, construing this statute, that it was the death of a sole party or if more than one, the death of all, that operates to exclude the other party from testifying in his own favor. See also *Bradish v. Belknap*, 46 Vt. 1; *Orr v. Clark*, 62 Vt. 136, 19 Atl. 929.

It was also objected that the offered evidence was inadmissible because Patrick was not the sole owner of the property. The argument is that he could not alone by deed convey any interest in such an estate, much less could he dispose of it by a parol gift. *Corinth v. Emery*, 63 Vt. 505, 22 Atl. 618, 25 Am. St. Rep. 780, is cited to this proposition. We are not now concerned with the question as to the power of the husband alone to dispose of premises held with his wife as tenants by entireties for here the offer was to show that Patrick and Ellen joined in the gift to John, which obviates this objection.

It was further objected that the testimony was inadmissible under the Statute of Frauds, upon the theory that real estate cannot, at law, be conveyed by parol gift; and, besides, that parol testimony would be inadmissible to defeat the record title. A similar claim was advanced in *Waterman v. Moody*, 92 Vt. 219, 103 Atl. 325, where the question was whether declarations by one holding the title to real estate, against an existing interest, were admissible against a party succeeding to the title. It was held that disserving declarations of a former owner made before parting with the title are admissible against those claiming under him on any issue relating to title, ownership or possession which may be proved by parol evidence. The Statute of Frauds is in no way involved, as the defendants are not seeking to have a contract respecting real estate enforced. It may be conceded that a parol gift of land conveys no title and operates only to create a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar of the statute is complete. But no principle is better settled than that a parol gift of land may ripen into a perfect title by adverse possession. 1 R. C. L. 753; 2 C. J. 150. All that the defendants claimed was the right to show that John Hogan went into posses-

sion under a parol gift, as affecting his acquisition of title by adverse possession.

It was held in *Pope v. Henry*, 24 Vt. 560, 565, that one going into the possession of land under a parol gift, and remaining quietly in possession for 15 years acquires good title by the mere acquiescence of the donor; and that the possession is regarded as quiet unless interrupted by a forcible ouster, or legal proceedings for that purpose. At least there can be no doubt that such a gift, accompanied by entry thereunder with claim of ownership, would evidence the beginning of an adverse possession which, if continued without interruption for 15 years, would mature into a good title.

It has been held that a gift of land by parol, accompanied by an actual entry and possession, manifests the donee's intention to enter and take as owner and not as tenant. *Mitchell v. Chicago, B. & Q. Ry. Co.*, 265 Ill. 300, 106 N. E. 833; *Nulton v. Nulton*, 247 Pa. 572, 93 Atl. 630; *New Haven Tr. Co. v. Camp*, 91 Conn. 539, 71 Atl. 788. It follows that it was vital to the defendants' claim to show that the original entry was not in subordination to the title of Patrick and Ellen; for, if John's entry was under this title and not under the gift, much more would be required to set the statute in motion. Then, to give the possession an adverse character, either actual notice of an adverse claim would have to be brought home to the owners, or some overt, notorious and unequivocal act or acts indicating a disavowal of their title of such a character that notice would be presumed, would have to be shown. See *Waterman v. Moody*, *supra*; *Kirley v. Kirley*, 236 Ill. 255, 86 N. E. 259.

The suggestion that defendants ought not to be heard to complain, because while the witness was on the stand in rebuttal the court told the defendants they might show that John went into possession under a gift to meet plaintiff's evidence that it was under a lease, is without force. It would be doubtful if a full opportunity to show the gift at that stage of the trial would have cured the error. The defendants were entitled to have their evidence of a gift appear as the basis of their claim of adverse possession; while the most they were offered was the opportunity to show the fact to rebut the plaintiff's evidence of a tenancy, introduced in rebuttal of their evidence of adverse possession. But reference to the transcript shows that the offer to show the gift by Catherine being renewed, the court ex-

cluded it on the ground of incompetency; so there is no possible theory on which it can be said that the error was cured.

Repeated declarations of both Patrick and Ellen, in the nature of admissions that John owned the property, made while they retained the title, were offered and excluded. Such declarations are ordinarily admissible to support an alleged gift. 12 R. C. L. 971. That they are admissible against privies in title, if otherwise admissible, is held in *Waterman v. Moody, supra*. It remains to consider whether an admission by one tenant by entireties is evidence against the other. One of the offers was to show an admission made by one in the presence and hearing of the other. That it was error to exclude the admission thus made is manifest. See 4 Wig. Ev. §.2232. What shall be said of those that were made by one when the other was not present?

The question of the admissibility of declarations or admissions of a husband or wife when offered against the other spouse is affected materially by the statute removing the disqualification of privilege. However it may have been before the statute made the husband and wife competent witnesses for or against each other, it cannot now be doubted that their statements in the nature of declarations of a grantor or possessor of property are admissible, if they satisfy the requirements as to the admissibility of similar statements of parties not husband and wife. 4 Wig. Ev. § 2232. In other words, the question is unaffected by the marital relation, except as the statute expressly provides.

To render these admissions receivable against the plaintiff they would have to be admissible against Patrick and Ellen, if they had brought this action before parting with title. Whether the admissions of one not made in the presence and hearing of the other would have been evidence against both depends upon the character of their interest in the property. It is well settled that statements of a joint owner affect the other owners, if there exists an identity of legal interest at the time the statements were made. 2 Chamb. on Ev. § 1318 a; 2 Wig. Ev. § 1081. See *Bank of U. S. v. Lyman*, 20 Vt. 666, Fed. Cas. No. 924. But it is necessary that there be identity and not merely community of interest. *Blondin v. Brooks*, 83 Vt. 472, 76 Atl. 184. 1 Green Ev. §§ 174, 176. The legal interest of tenants by entireties is not identical. While in such an estate the husband and wife are each seized of the whole by a single title with equal right of survivorship, and to this extent have a joint interest, as against

the wife, the husband has, in addition, during their joint lives a freehold interest by which he takes the possession and usufruct of the whole as marital rights. During this period the wife has no control over the property and no interest therein, except the right of homestead (if there be one) and the right of survivorship. *Corinth v. Emery*, 63 Vt. 505, 22 Atl. 618, 25 Am. St. Rep. 780; *Laird v. Perry*, 74 Vt. 454, 52 Atl. 1040, 59 L. R. A. 340; *Citizens Sav. Bk. & Tr. Co. v. Jenkins*, 91 Vt. 13, 99 Atl. 250. This being so, an admission by Ellen that John owned the property could not be used to deprive Patrick of the possession and income of the premises; nor could his admission to the effect that John had acquired title by adverse possession be set up against her right of survivorship. It follows that it was not error to exclude the admission of one made in the absence of the other.

Neither was it error to exclude the offer to show an attempt by Catherine Hogan after her husband's death to borrow money for the payment of taxes, accompanied by a declaration that she owned the premises. She was not seeking to tack her possession to that of her husband to make out the necessary time, but stood on a title perfected by adverse possession before the death of her husband.

The defendants argue an exception to testimony given by Ellen Hogan with reference to a contract of lease under which plaintiff claimed John went into possession, on the ground that she was incompetent to testify on that subject. We might dispose of the question by saying that it was not sufficiently raised by the exception; but as the question will doubtless arise at the retrial, it seems advisable to consider it. The witness was a party to the claimed contract and the other party was dead. She was therefore incompetent to testify on the subject, except to meet or explain the testimony of living witnesses produced against the plaintiff who was invoking the contract. *Rickard v. Dana*, 74 Vt. 74, 52 Atl. 113; *Foster v. King's Est.*, 73 Vt. 278, 50 Atl. 1061. But under the exception in the statute she was a competent witness to give evidence that would meet and explain facts testified to by such witnesses and legitimate inferences deducible therefrom. *In re Bugbee's Will*, 92 Vt. 176, 102 Atl. 484. With the evidence received that was offered to show a gift, there would be no question but that her testimony as to a lease would be admissible. It is unprofitable to consider how it would be otherwise.

The defendants excepted to the charge that the burden was upon them to show that their possession was adverse. The claim is that if there was a gift of the property there would be a presumption that John occupied thereunder claiming ownership, and that the burden would be on the plaintiff to show the contrary. But conceding that there would be such a presumption, still the burden of proof, as distinguished from the burden of evidence, would be where the court placed it, aided, to be sure, by the presumption. See *Rutland Ry. L. & P. Co. v. Williams*, 90 Vt. 276, 98 Atl. 85.

Reversed and remanded.

THE HAGLIN-STAHN COMPANY v. MONTPELIER & WELLS RIVER
RAILROAD.

November Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, and TAYLOR, JJ.

Opinion filed February 12, 1918.

*Carriers—Interstate Commerce—Liability of Common Carriers
for Damages to Goods in Its Custody—Burden of Proof—
Carmack Amendment—Bill of Lading—Claim for Damages
—Depositions—Use by Either Party—Trial—Agreement of
Counsel—Harmless Error—Damages.*

Where freight shipments are interstate the rights of the shipper and carrier depend wholly upon the Federal statutes, the bills of lading and the rules of the common law as accepted and applied in the Federal Courts.

Prima facie a common carrier, by accepting goods for transportation, incurs the responsibilities put upon him by the common law, or that law as modified by statute; and anyone asserting the contrary assumes the burden of proving it.

A common carrier is liable for loss or damage to goods in its custody unless caused by the act of God, the public enemies, the fault of the shipper, acts of competent authority, the inherent nature of

the property, or some cause against which it has lawfully contracted.

Upon showing that goods were delivered to a common carrier in good condition and that they arrived in bad condition, the carrier is conclusively presumed to be at fault, no matter how careful he has been, unless he shows that the damage resulted from one of the excepted causes.

Under the Carmack Amendment an initial carrier is liable for loss or damage to an interstate shipment, as it is under the common law, whether the loss or damage occurs upon its line or upon that of a connecting carrier.

The common law rule which requires a carrier who relies upon one of the exceptions to its liability as a defence to a claim for damages to establish the fact that such damages proximately resulted therefrom, is unaffected by the Carmack Amendment.

A provision in a bill of lading for filing a written claim for damage to a shipment within four months after delivery thereof is binding upon the shipper, when reasonable and not waived.

A deposition, taken under an agreement which indicates that it was contemplated that the instrument should be used by either party may be introduced in evidence by either party.

In an action against a common carrier to recover for injuries to a shipment, an argument by plaintiff's counsel to the effect that defendant had notice of the claim for damages prior to the filing of a written notice, as required by the bill of lading, was unwarranted, but, under the circumstances, harmless.

In an action against a common carrier to recover for injuries to a shipment, plaintiff is entitled to recover as damages a sum equal to simple interest at the lawful rate from the time of the arrival of the goods until the sitting of court, and not merely from the time of filing a written claim for damage as required by the bill of lading, this provision being only a matter of contract and, while essential to a recovery, affecting plaintiff's remedy only, and not his right.

CASE, to recover for injuries to a granite monument, delivered under a bill of lading to defendant as initial carrier, to be shipped from Barre, Vermont, to Waseca, Minnesota. Plea, the general issue. Trial by jury at the March Term, 1917, Washington County, *Miles, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion states the case.

H. C. Shurtleff for defendant.

J. Ward Carver for plaintiff.

POWERS, J. The plaintiff is a partnership engaged in the granite business at Minneapolis. The defendant is a common carrier doing business under a Vermont charter in both intrastate and interstate transportation. At different times, the plaintiff delivered to the defendant two certain pieces of granite for shipment to itself at Waseca, Minn. These shipments were received and forwarded over various connecting railroads under through bills of lading, each of which contained the following conditions:

"No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

"No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for de-

livery had elapsed. Unless claims are so made the carrier shall not be liable."

The plaintiff's evidence tended to show that the blocks of granite were in good condition when delivered to the defendant, and that when they arrived at Waseca they were broken and had to be replaced. This action is brought to recover the damages so occasioned to the plaintiff. Judgment below was for the plaintiff, and the case comes here on the defendant's exceptions.

The shipments being interstate, the rights of the parties depend wholly upon the Federal statutes, the bills of lading, and the rules of the common law as accepted and applied in the Federal Courts. *Piper v. B. & M. Railroad*, 90 Vt. 176, 97 Atl. 508; *Cincinnati, N. O. & Tex. Pac. R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917 A, 265. By the common law, a common carrier is answerable for every loss or damage happening to goods in his custody as carrier, by whatever cause occasioned, unless caused by the act of God or the public enemies. *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349; *Hall v. Nashville & Chattanooga R. Co.*, 80 U. S. (13 Wall.) 367, 20 L. ed. 594. This exceptional liability is imposed from considerations of public policy, and is the law of this case, except so far as it may have been modified by the Carmack Amendment to the so-called Hepburn Act, or a valid contract made thereunder.

Prima facie, such a carrier, by accepting goods for transportation, incurs the responsibilities put upon him by the common law, or that law as modified by statute (*Park v. Preston*, 108 N. Y. 434, 15 N. E. 705); and any one asserting the contrary assumes the burden of proving it. *N. J. Steam Nav. Co. v. Merchants Bk.*, 6 How. 334, 12 L. ed. 465.

While the common law rule is as above set forth, a comprehensive statement of the law as now generally recognized and accepted is that such a carrier is liable for such loss or damage unless caused by the act of God, the public enemies, the fault of the shipper, acts of public authority, the inherent nature of the property, or some cause against which he had lawfully contracted. In speaking of this extraordinary liability of a common carrier, it should be constantly kept in mind that, while it is more or less customary to use the term "negligence" in speaking of it, the "prudent man" rule as commonly understood has no application. All that it is necessary to show in order to estab-

lish *prima facie* liability is that the goods were delivered to the carrier in good condition, and that they arrived in bad condition. Upon such a showing, the carrier is conclusively presumed to be at fault unless he shows that the damage resulted from some of the causes above specified. No matter how careful he has been, his calling makes him liable for every loss not caused by the excepted perils. *Hall v. N. & C. R., supra.*

But it is insisted that the Carmack Amendment has restricted this liability,—at least so far as the initial carrier's responsibility for damages suffered after the goods were delivered to the connecting carrier is concerned, and that thereunder the initial carrier is liable for damages so occasioned only in case of negligence on the part of the connecting carrier. In other words, the claim is, that though the initial carrier may stand as an insurer so far as loss or injury on his own line is concerned, after he has delivered the property in good order to the connecting carrier, he is only liable for such loss or injury as may result from that carrier's negligence.

The provision of the statute is that a carrier who accepts a shipment for a point in another state shall be liable for any loss, damage or injury "caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass." U. S. Comp. St. 1916, par. 8604a. To support its position as to the true meaning of this provision, the defendant relies upon *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257. It is true that this case has been sometimes accepted as authority for the position taken by the defendant, but this interpretation of it is unwarranted. The language used by Mr. Justice Lurton in discussing the statute in question, is as follows: "What is the liability imposed upon the carrier? It is a liability 'for any loss, damage or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer, and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words 'any loss or damage,' would be to ignore the qualifying word 'caused by it.' The liability thus

imposed is limited to any 'loss, injury or danger caused by it or a succeeding carrier to whom the property may be delivered'; and plainly implies a liability for some default in its common law duty as a common carrier."

It thus appears that the Court was talking about a liability as an *absolute* insurer, one liable without any exception, and did not intend to lay down a rule in any respect short of the common law rule. That a carrier could be guilty of some default in its common law duty, and at the same time not be guilty of negligence is quite apparent. For if it failed to carry safely it would be so in default, no matter how careful it had been. In speaking of the Carmack Amendment as thus construed, it was said by Mr. Justice McReynolds in *Cincinnati, etc., R. Co. v. Rankin*, 241 U. S. 319, 60 L. ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917 A, 265: "Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on its own line."

This language, taken with that of Mr. Justice Lurton, quoted above, has given rise to the idea that there are two rules by which to measure the liability of an initial carrier,—one to use when the loss occurs on its own line, and the other when the loss occurs on the line of a connecting carrier. The idea is erroneous. It is clear from the language of Mr. Justice McReynolds that so far as loss or damage occurs on the lines of the initial carrier, his common law liability therefor is unaffected by the amendment. This was as far as the case then in hand required the Court to go. But in other cases it is made plain that the amendment extends this common law liability throughout the transit. In *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7, Mr. Justice Lurton says: "Reduced to the final results, the Congress has said that a receiving carrier * * * shall be deemed, when it receives property in one state to be transported to a point in another, involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route * * *."

It is plain enough that the "carrier liability" here spoken of is the common law liability as hereinbefore stated. Again, in *Galveston, etc. Ry. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. 205, Mr. Justice Lamar, in speaking of the initial

carrier's liability, says: "It (the initial carrier) thereby elected to treat connecting carriers as its agents for all purposes of transportation and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice and presumption as would have applied if the shipment had been between stations in different states, but both on the company's railroad."

Surely, this statement can be justified only on the ground that the initial carrier's common law obligations continue throughout the chain of transportation. Other cases to the same effect are *Missouri, K. & T. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. 397; *Collins v. Denver & R. G. Ry. Co.*, 181 Mo. App. 213, 167 S. W. 1178; *Storm Lake, etc. Factory v. St. L. R. Co.*, (D. C.) 209 Fed. 895; *Georgia, etc. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. 541. This defendant, then, is liable for the damage here shown, unless it resulted from some of the excepted causes above specified.

When a carrier relied upon one of these exceptions as a defence, the common law required him to establish the fact that the damages proximately resulted therefrom. *Jonesboro, etc. Co. v. Dunnavant*, 117 Ark. 451, 174 S. W. 1187; *St. Louis, etc. R. Co. v. Dreyfus*, 42 Okl. 401, 141 Pac. 733, L. R. A. 1915 D, 547; *Chicago, etc. R. Co. v. Logan, Snow & Co.*, 23 Okl. 707, 105 Pac. 343, 29 L. R. A. (N. S.) 683, and note; *Day v. Ridley*, 16 Vt. 48, 42 Am. Dec. 489; *Bennett v. Am. Express Co.*, 83 Me. 236, 22 Atl. 159, 13 L. R. A. 33, 23 Am. St. Rep. 774; *Cudahy Packing Co. v. Atchinson T. & S. F. R. Co.*, 193 Mo. App. 572, 187 S. W. 149. This rule is unaffected by the Carmack Amendment. *Galveston, etc. R. Co. v. Wallace, supra*, is full authority for this statement. After stating what is hereinbefore quoted, the Court goes on to say: "Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged to prove their case and to disprove the existence of a defence. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them or explaining why that had not been done. This must be so, because carriers not only

have better means, but often the only means of making such proof. If the failure to deliver was due to the act of God, the public enemy, or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover."

Assuming that the defendant here produced evidence tending to show that the damage involved in this suit resulted from a legally excepted cause, that only made questions for the jury to decide, and the plaintiff's verdict made an end of it. The burden was on the defendant, and it simply failed in the proof.

An application of the foregoing rules to the case in hand disposes of most of the questions relied upon by the defendant, including its motion for a verdict. Specific reference to such is unnecessary. One or two points made require special treatment.

As we have seen, the bills of lading contained a provision for the filing of written claims within four months after delivery of the consignments. That such provisions are binding upon the shipper when reasonable and not waived is fully established. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. 541; *Northern Pacific R. Co. v. Wall*, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. 493; *Chesapeake, etc. R. Co. v. McLaughlin*, 242 U. S. 142, 61 L. ed. 207, 37 Sup. Ct. 40; *St. Louis, etc. Ry. Co. v. Starbird*, 243 U. S. 592, 61 L. ed. 917, 37 Sup. Ct. 462. The only evidence of a compliance with this requirement came into the case by way of the admission of a question and answer in the deposition of the station agent of the delivering carrier, to which the defendant excepted. It appears that this deposition was taken at Waseca by agreement of counsel. It is stated in the bill of exceptions that the plaintiff took this deposition and that the defendant did not cross examine the witness, but made him its own witness, and asked him when the claims for damages were first presented to the delivering carrier. He answered that it was in the first part of January, 1911, which would be within the time limited in the bills of lading. In support of its exception to the admission of this evidence, the defendant argues that that part of the deposition was its own, and it alone could say whether it should be used in evidence or not, citing *Lord v. Bishop*, 16 Vt. 110; *Wait v. Brewster*, 31 Vt. 516, and *Wing v. Hall*, 47 Vt. 182. If it were necessary to pass upon the soundness of these cases as applied to present-day

conditions, we should proceed with some caution. There is much good sense in the opinion in *Taylor v. Thomas*, 77 N. H. 410, 92 Atl. 740, wherein a previous decision of that court in harmony with our cases above was overruled and the rule established that either party could use a deposition taken for use in a case pending in court. But the deposition before us does not stand like the ordinary deposition taken on notice. It was taken by agreement, and such a deposition may be used by either party. *Western Union Tel. Co. v. Hanler*, 85 Ark. 263, 107 S. W. 1168. The agreement under which this deposition was taken indicates that it was contemplated at that time that the instrument should be used by either party. The exception is not sustained.

The argument of plaintiff's counsel to the effect that the defendant had notice of the claims for damages prior to the filing of the written notices was unwarranted, but harmless. The court charged correctly on that subject and prejudice does not appear.

The plaintiff was allowed to recover as damages a sum equal to simple interest at the lawful rate from the time of the arrival of the goods at their destination to the time of the sitting of the trial court. To this, the defendant excepted on the ground that interest would not begin to run until the written notice was filed. But for the requirement of notice, the rule applied by the court was undoubtedly correct. *Blumenthal v. Brainard*, *supra*. It is true that any condition precedent must be performed, whether it be prescribed by statute, by agreement, or by implication from circumstances. It may operate on the right itself, as when a statute creates a new right to which a condition is annexed; or it may operate merely as a limitation upon the remedy. In the former case, its performance constitutes an essential element of the cause of action; in the latter it does not prevent the accrual of the right of action, but merely stalls the remedy thereon. The written claim required by the bills of lading is a mere matter of contract. It is essential to a recovery but only affects the plaintiff's remedy, and interest was properly allowed from the time of delivery. *Robinson Bros. v. Merchants Dispatch Trans. Co.*, 45 Ia. 470.

Judgment affirmed.

NELSON JOHNSON v. CHARLES DOUBLEDAY.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 12, 1918.

*Evidence—Remoteness—Discretion of Court—Motion for Directed Verdict—Master and Servant—Safe Place Doctrine.—Jury Question—Duty of Master to Inspect—Reliance by Servant—Negligence—Contributory Negligence—“Vari-
ance”—“In and About”—Motion to Set Aside.*

The question of the remoteness of offered evidence is, ordinarily, one addressed to the discretion of the trial court, but this discretion is a judicial discretion and must be exercised in such a way as to make the result harmonize with the true spirit of the law.

Evidence that the penstock at defendant's mill was leaking a year previous to the accident to plaintiff was properly excluded by the trial court, in its discretion, as being too remote to have any tendency to prove that it was in that condition at the time of the accident.

On reviewing a motion for a directed verdict, the Court will take as established all that the plaintiff's evidence fairly and reasonably tended to show.

Plaintiff was employed by defendant to oil the machinery in the latter's mill, but was not instructed as to the location of the places to be oiled. Thinking he smelled a hot box, he attempted to find the heated bearing, and in doing so went to a place where there was in fact no machinery to see if there was anything there that needed oil. While there, the floor gave way, and he suffered the injuries complained of. *Held*, it was plaintiff's duty, under the circumstances, to make reasonable search for the bearings to be oiled, and if he acted reasonably in going where he did, he was, in the eye of the law, within the line of duty.

Wherever a servant may, by the requirements of his engagement, reasonably be expected to go, is a part of his working place to which the safeplace doctrine applies.

In an action of tort by a servant against his master to recover for personal injuries, the question whether or not the servant, at the time of the accident, was where he might reasonably be ex-

pected to go by the requirements of his engagement, was for the jury.

The duty of inspecting the floor of a mill is upon the proprietor thereof, and a servant in his employ has a right, nothing to the contrary appearing, to assume that this duty has been performed. Where the evidence is not all one way, the questions of negligence and contributory negligence are for the jury.

The term "variance" in its legal sense means material difference.

Under a declaration, charging that defendant failed to provide plaintiff a safe place in which to work, in that the floor was insufficient to sustain him as he passed over it in and about his duty of oiling certain machinery, proof that plaintiff, at the time of the accident, was looking for the machinery, with the location of which he was not familiar, for the purpose of oiling it, did not constitute a variance, because he was doing something which was incidental to his duties and fairly within the terms "in and about" that work, and any inaccuracy of other allegations in regard to what he was doing were immaterial.

A motion to set aside a verdict is addressed to the discretion of the trial court, and where it does not appear that this discretion was withheld or abused, the ruling will not be revised.

TORT FOR NEGLIGENCE. Plea, the general issue. Trial by jury at the September Term, 1916, Rutland County, *Butler, J.*, presiding. Verdict for plaintiff. Defendant excepted. The opinion states the case.

Marvelle C. Webber and *J. P. Leamy* for defendant.

Lawrence, Lawrence & Stafford and *Asa S. Bloomer* for plaintiff.

At the time of receiving his injuries, plaintiff was acting in the line of his duty. *Baker v. Duwarnish*, 43 Wash. 149, 86 Pac. 167; *Hefferin v. The Illinois*, 63 Fed. 161; *Harty v. The Hartford Faience Co.*, 97 Atl. 1020; 4 Thompson on Negligence, sec. 3749; *Upton v. Bartlett et al.*, 13 N. Y. S. 451; *T. H. & I. R. R. Co. v. Fowler*, 48 L. R. A. 531; *Stone v. Boscawen Mills*, 71 N. H. 288, 52 Atl. 119.

POWERS, J. The plaintiff was injured in the defendant's mill and brings suit to recover damages therefor. He had judgment below and the defendant brings the case here on exceptions.

There was evidence which, viewed in the light most favorable to the plaintiff, fairly and reasonably tended to show the following facts: The plaintiff hired out to the defendant, and among other things engaged to work a part of the time in his mill. As a part of his duties when at work in the mill, the plaintiff was to oil the boxes of machinery. He was soon put to work in the mill assisting Fred Doubleday, the defendant's son, who had immediate charge of that enterprise. During the second day, he was at work in the millyard, and had occasion to go and did go into the mill on an errand of his own. When he entered the mill, he thought he detected the odor of a hot box. He took an oil can and proceeded to look for the trouble. He went down into the wheel pit and examined and oiled the bearings there; he came back up into the basement where some of the machinery was, and noticing what appeared to be a shaft on or near the floor, near the far end of which was a hole in the floor, stepped over to that point to see if there was anything there that needed oil or attention. When he did so, the floor broke beneath him and in his fall he suffered the injuries here complained of. He had never been told where to find the different oiling places, and there was, in fact, nothing to oil in the place where he was injured or within about seventeen feet thereof. The shaft above referred to was not in use and the hole in the floor near the end had no relation to the machinery, though some of the oiling was done through holes in the floor.

The plaintiff testified that the machinery was running when he went down into the wheel pit, and to meet and contradict this, the defendant gave evidence tending to show that the plaintiff's clothing was dry when he returned to the yard, and that it was impossible, owing to the leaking condition of the penstock, to go down into the pit when the machinery was running without getting wet. The defendant then offered to show by one Ira Westcott that a year previous to the time of the accident the condition of the penstock in this respect was such that one could not go down there without getting wet. This was excluded as being immaterial and too remote.

As the case stood, we cannot say that this evidence was immaterial. On that ground alone, the ruling could not be sustained. But if the court was justified in holding that the evidence was too remote, its exclusion was without error.

The question of remoteness is, ordinarily, one addressed to

the discretion of the trial court. *Niles v. C. V. Ry. Co.*, 87 Vt. 356, 89 Atl. 629. This discretion is, of course, a judicial discretion, and must be exercised in such a way as to make the result harmonize with the true spirit of the law. And while cases might easily be cited where it would be properly reviewable, we do not think the case in hand, especially in view of the fact that there was no evidence that the condition of the penstock was unchanged, is of that class.

At the close of the evidence, the defendant moved for a verdict and excepted when that motion was overruled. In support of this exception it is urged with much vigor that the defendant cannot be held liable because the plaintiff, at the moment of his injury, was both outside the scope of his employment and outside his working place. To maintain his position the defendant dwells upon that part of the evidence tending to support it. But the evidence of the plaintiff is not to be ignored. Evidently the jury accepted it at its face value. There is nothing for us to do but to take as established all that it fairly and reasonably tended to show. From this evidence, the jury was warranted in inferring that the plaintiff was within the scope of his employment and in his working place.

As we have seen, he was employed to do the oiling. He was not told where the boxes and bearings were, but left to seek them out for himself. In these circumstances, it was as much his duty to make reasonable search for such boxes and bearings as it was to oil them when found. When he stepped into the mill on the occasion in question, he thought he smelled a hot box. He recognized this as a danger signal, and set about finding and correcting the trouble. The fact that he was mistaken and there was no hot box does not as matter of law change his situation. If he acted reasonably, he was in the eye of the law within the line of his duty. Again, when he came up out of the pit and saw the old shaft with the hole near the end of it, if he acted reasonably in looking there for an oiling place, he was still in the line of his duty. It was for the jury to say about this. The same may be said as to his proper working place. The safe place rule does not require a workman to stand in one particular spot all the time to be within its protection. But it extends to all parts of the premises to which his duties reasonably require him to go. Wherever he may, by the requirements of his engagement, reasonably be expected to go, is a part of his work-

ing place within the meaning of the law. Whether or not the plaintiff brought himself within this rule was a jury question.

There was evidence warranting the inference that the plaintiff was in the exercise of due care and that he did not assume the risk. It tended to show that he was going about his work in the usual way. He was not obliged to inspect the floor. That was the defendant's duty. The plaintiff had a right, nothing to the contrary appearing, to assume that this duty had been performed. *Dunbar v. C. V. Ry. Co.*, 79 Vt. 474, 65 Atl. 528. True, he saw a hole in the floor. That was one of the things that deceived him. But it was not very light down there and the floor was covered with sawdust and shavings. The character of the insufficiency was such that it would require some special attention to discover it. The evidence was not all one way, and both these questions were for the jury.

It is also urged that there was a variance between the allegations and the proof. But the term "variance" in its legal sense means material difference. *Skinner v. Grant*, 12 Vt. 456. The charge in the declaration is that it was the plaintiff's duty under his employment to oil the machinery and fixtures, and that the defendant failed to provide him a safe place in which to do that work, for that the floor in the basement was so old and rotten that it was insufficient to sustain his weight as he passed over it "in and about" his work of oiling. While it is true that he was not in the very act of oiling when the floor collapsed, he was doing something incidental thereto and was fairly within the terms "in and about" that work. Any inaccuracy of the other allegations in regard to what he was doing are immaterial. *Fowlie's Adm'x v. McDonald, Cutler & Co.*, 82 Vt. 230, 72 Atl. 989.

The defendant saved an exception to the charge; but the instruction complained of was in full harmony with the views herein expressed, and the exception is without merit.

The motion to set aside the verdict was addressed to the discretion of the trial court, and we find nothing in the record warranting a holding that that discretion was withheld or abused. *Lincoln v. C. V. Ry. Co.*, 82 Vt. 187, 72 Atl. 821, 137 Am. St. Rep. 998.

Judgment affirmed.

MARY L. BROWN v. VERMONT MUTUAL FIRE INSURANCE COMPANY.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 18, 1918.

Bill of Exceptions—Docket Entries—Witnesses—Competency—General Objection—Exceptions—When Waived—Sufficiency—Fire Insurance—Proof of Loss—Motion for Verdict—Damages.

Where the bill of exceptions and transcript do not show that any judgment was rendered in the case nor any exception taken to it, the Supreme Court may refer to the docket entries for information.

The signing of a bill of exceptions by the presiding judge within the time limited places upon the record the questions of law arising upon the trial, and entitles the excepting party to a consideration of the questions which are properly raised.

The competency of a witness to testify as to value is a preliminary question and is not raised by a general objection to his testimony upon the subject.

An exception to the competency of a witness to testify as to value may be treated as waived where the objection was not renewed after the question was not pressed, and further questions asked as to the qualifications of the witness.

The question of the competency of a witness to testify as to value is not saved by an objection that an inquiry as to the value of a house "assumed certain things which were not in evidence."

An exception to the reception of evidence for which no grounds were stated, cannot be said sufficiently to appraise the trial court of the objection that the questions asked permitted to be shown negotiations for a settlement made by one with no authority to bind the party.

In an action against an insurance company to recover upon a fire insurance policy, it was not error to overrule defendant's motion for a verdict on the ground that plaintiff had failed to furnish defendant with an amended proof of loss, as required by No. 115, Acts 1908, where the plaintiff insisted that the proof of loss already filed by her was correct, and, on trial, elected to stand upon its sufficiency.

If a proof of loss, filed under the provision of a fire insurance policy is sufficient, and is filed within the time limited, such proof is not void because the insured has failed to furnish the insurance company with an amended proof, as required under certain circumstances by No. 115, Acts 1908.

A request for a binding instruction that the jury return a verdict for defendant, presents the same question that is raised by a motion for a verdict.

In estimating the damages in an action upon a fire insurance policy, the jury may consider the cost of replacing the buildings destroyed with ones of equal value.

CONTRACT upon a fire insurance policy. Answer, the general issue, with notice of special matter in defence; among other things, that plaintiff had not furnished defendant with an amended proof of loss within thirty days after notice that the proof already furnished was defective, and that therefore the policy was void. Trial by jury at the September Term, 1916, Rutland County, *Butler, J.*, presiding. Verdict for plaintiff. Defendant excepted. The opinion states the case.

C. V. Poulin for defendant.

John S. Dorsey for plaintiff.

MILES, J. This is an action of contract with a count in general assumpsit, on a fire insurance policy. The exceptions relied upon by the defendant in its brief, are to the admission of evidence, to a certain portion of the charge of the court and to the court's refusal to direct a verdict for the defendant. The plaintiff challenges the sufficiency of the defendant's exceptions, upon the ground that it does not appear in the exceptions nor in the transcript, that any judgment was rendered in the case or exception taken to it, and an examination of the exceptions and the transcript shows the fact to be as claimed by the plaintiff; but an examination of the docket entries, certified to the clerk of the general term, shows that on October 26, 1916, a verdict was rendered against the defendant, on November 15, 1916, judgment was entered for the plaintiff, on December 18, 1916, defendant's skeleton bill of exceptions was filed and on August 9, 1917,

defendant's completed bill was filed. To these entries this Court may refer. *Spaulding v. Warner*, 57 Vt. 654.

From the docket entries it appears that following the judgment exceptions were noted. Within the time limited, the presiding judge signed and filed a bill of exceptions, which placed upon the record the questions of law arising at the trial. This entitled the defendant to a consideration of the questions which are properly raised. 2 R. C. L. 92, par. 68; *Felt v. R. R. Co.*, 48 Colo. 249, 110 Pac. 215, 1136, 21 Ann. Cas. 379; *Koehler v. Ball*, 2 Kansas 160, 83 Am. Dec. 451; 3 C. J. 939, par. 827; *Estabrooks v. Ins. Co.*, 74 Vt. 202, 52 Atl. 420.

The defendant makes six points in its brief, and the first one made is to testimony of the plaintiff as to the value of the property destroyed by the fire, and that point embraces six objections, to all of which no ground is stated, and the objections and exceptions taken are all as follows: "Objected to, exception by the defendant."

The defendant urges in support of these objections only that there was no evidence that the plaintiff had any special knowledge of the value of the things testified about. Such an exception goes to the competency of the witness to testify as to values, which is a preliminary question and not raised by a general objection. *Brown v. Aitken*, 90 Vt. 569, 99 Atl. 265.

The second point in the defendant's brief is as to questions to Jacob F. Bidgood, in which the defendant says it was error to admit his testimony, as it does not appear that he had any knowledge of land values in the vicinity of the property in question. The point briefed, if we treat it as properly briefed, relates to a question as to the value of the house at the time of the fire. The objection to this question was that it "assumed certain things which were not in evidence." Earlier in the witness' testimony the objection to incompetency to express an opinion as to values, now relied upon, was interposed and thereupon the examiner, without taking an answer to the question objected to, asked numerous questions for the purpose of qualifying the witness to express an opinion. The objection to competency was not renewed and the court could properly treat it as waived. The exception taken is not briefed and the question briefed is not saved.

The third point raised in the defendant's brief is based upon exception 8 of the bill of exceptions, and that exception is to the overruling of defendant's objections to questions asked the

plaintiff when recalled to the witness stand after the testimony above referred to. No ground of objection was stated; but the defendant argued that it was an attempt to show negotiations for a settlement with Brockway, who had no authority to settle the matter. The question relied upon in the argument was not raised by a general objection to what Brockway, the defendant's adjuster, said concerning the loss. The only objection and exception made in this connection was as follows: "Objected to, exception by defendant." It cannot be said that such an exception sufficiently appraised the trial court of the objection that the questions permitted negotiations for a settlement to be shown and that Brockway had no authority to bind the principal.

The fourth point in the defendant's brief is to the overruling of the motion for a directed verdict and is exception 11. The point of this exception is that the plaintiff failed to furnish the defendant with an amended proof of claim within thirty days after notice by the defendant that the proof of claim already filed was not satisfactory. The fire occurred October 23, 1915 and on October 25, 1915, the defendant was notified of the fact and November 20, 1915, the defendant notified the plaintiff to send to it a proof of loss, which she did November 27, 1915, and the same was received by the defendant November 29, 1915, and on the 6th day of December, 1915, the defendant returned the proof of loss to the plaintiff with its objection and asking for a corrected proof. To this the plaintiff replied that she had given a correct proof of loss, and to this letter the defendant, on the 14th day of December, replied that it did not agree with her and asking her for a meeting at its office at Montpelier to adjust the matter. Later a meeting was had between the plaintiff and Walter Brockway, an agent of the defendant, at the office of J. C. Jones, Esq., in Rutland, Vt., where the conversation to which the defendant objected and excepted as above, took place. Previous to this meeting the plaintiff had insisted that the proof she had already sent to the defendant was correct and she insisted upon that claim on the trial and that question was submitted to the jury with proper instructions by the court. It was a question of fact whether the plaintiff had made the proof of loss within thirty days after notice by the defendant to do so, and it is not disputed by the defendant but that the proof relied upon by the plaintiff was made and furnished within thirty days

after notice. The plaintiff elected to stand upon her claim that the proof of loss was made and delivered to the defendant in accordance with the terms of the policy and the law, and therefore she was not required to make and deliver any other proof of loss. The plaintiff elected to stand or fall upon the sufficiency of the proof which she had made and delivered upon notice, and the jury have found that it was sufficient, and if there was evidence supporting that finding, it was not error to overrule the motion. *Smith v. Franklin*, 61 Vt. 385, 17 Atl. 838; *Manley v. D. & H. Co.*, 69 Vt. 101, 37 Atl. 279; *Fitzsimons v. Richardson et al.*, 86 Vt. 229, 84 Atl. 811. There was evidence supporting the plaintiff's claim and the verdict of the jury. The plaintiff's own testimony and that of several of her witnesses supported it. There was no error in overruling the motion.

The fifth point made by the defendant was on the exception to the court's charge and failure to charge as requested. The first exception to the charge, as stated by the defendant in the bill of exceptions, is as follows: "The defendant excepted to the charge of the court with reference to the proof of loss, wherein the court said as matter of law it was sufficient, and as to being filed in time, and so far as proof of loss was concerned the plaintiff would be entitled to recover."

Upon an examination of the charge we find the exception stated does not give the true import of the charge. What the court said upon that matter was as follows: "The proof of loss states that they placed in the schedule the barn at \$500 and the house at \$800. The plaintiff says that was a fair value and a sound value of the house and the sound value of the barn, as so set forth in the application. The evidence tends to show it was of that value; that the house was of that value and the barn was of that value. If it was, then the proof of loss was sufficient, and was filed in time, on the 29th day of November, 1915, and so far as the proof of loss is concerned, the plaintiff would be entitled to recover."

This was a correct statement of the law upon the question of the sufficiency of the proof of loss made and delivered to the defendant, in view of the claim of the defendant that the action was barred, because the plaintiff had failed to make and deliver a sufficient proof of loss. The defendant cites No. 115 of the Acts of 1908 in support of its claim that the proof of loss filed by the plaintiff is void; because the defendant gave her notice to make

and deliver a new proof of loss which it claims she failed to do. The act does not support the defendant's claim. That act only requires a new proof to be filed when the proof already filed is defective and insufficient in some material respect.

As to the request to charge, it was nothing more nor less than a request for a binding instruction that the jury return a verdict for the defendant, and presents the same question that is raised on the motion for a verdict, which we have held was properly overruled.

The sixth and last point made in the defendant's brief is to a portion of the court's charge, and is stated in the bill of exceptions as follows: "The defendant also excepts to what the court said or charged the jury, that they might, in considering the value of the buildings, consider the cost of rebuilding."

The charge of the court upon this point as to the measure of damages for the loss of the house and barn, was, in substance, that the difference in value of the farm before the fire with the buildings standing thereon and its value after the fire without the buildings, was the loss sustained on account of the destruction of the house and barn, to which no exception was taken.

In calling the jury's attention to the manner in which they should determine those values and the things to be considered in that connection, the court, among other things, instructed them as follows: "Now, in determining what this difference would be, we must consider the location, the size of the farm, the size and condition in which the buildings were at the time of the fire, their age, the cost of replacing the buildings in case they were destroyed—all as bearing upon the question as to the difference between the value of the property before the buildings were destroyed, and its value with the buildings burned down."

The charge of the court upon this point was satisfactory to the defendant, except that portion wherein the court said the jury might consider "the cost of replacing the buildings in case they were destroyed." The charge thus excepted to was in effect a charge that the jury might consider the cost of replacing buildings of equal value with those destroyed, and is in line with the clause in the policy providing a limitation of damages in case of loss, wherein it is said: "Which loss or damage shall in no event exceed what it would cost the assured to repair or replace the property with material of like kind and quality."

It was an instruction in the interest of the defendant, limiting but not fixing its liability, and the charge in this respect is in accordance with the law laid down in *Citizens Savings Bank v. Insurance Co.*, 86 Vt. 267, 84 Atl. 970. There was no error in this part of the charge.

Judgment affirmed.

TICHNOR BROTHERS v. JOSEPH EVANS.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 25, 1918.

Contracts—Breach—Damages.

In a contract of sale of certain merchandise, the breach of a stipulation that the vendor would not sell like merchandise to any of the vendee's competitors in trade will not justify the vendee in refusing to pay the contract price, since the breach does not go to the essence of the contract, but only to a part of the consideration, and may be compensated for in damages.

When a contract has been partly performed by one party, and the other has derived a substantial benefit therefrom, the latter cannot refuse to comply with its terms simply because the former fails of complete performance.

ASSUMPSIT. Plea, the general issue. Trial by court at the June Term, 1917, Bennington County, *Slack*, J., presiding. Judgment for plaintiff. Defendant excepted. The opinion states the case.

Holden & Healy for defendant.

Collins M. Graves for plaintiffs.

POWERS, J. In the spring of 1914, the plaintiffs, through their traveling salesman, Pierce, sold the defendant a bill of

goods which included the post card sets here in controversy. At the time of the sale, Pierce told the defendant that if he would buy the sets at the price named, he, Pierce, would not sell like sets to any one else in the town. Upon this assurance, the defendant made the purchase. The plaintiffs did not keep this agreement, but at sometime during the following winter, they sold similar sets to one of the defendant's competitors doing business on the same street. The defendant learned of this about the first of June, 1915, but said or did nothing about it until some two years later and just before the trial below. The suit is brought to recover the balance due on the goods sold, and is defended on the ground that the plaintiffs, having broken the contract in the particular named, are not entitled to recover anything under it.

The trial below was by the court, and it is recited in the findings that there was no evidence from which a determination could be made as to the amount of damage the defendant had suffered by reason of the above mentioned breach of the contract by the plaintiffs. Therefore, the court assessed such damage at one dollar, deducted it from the amount due the plaintiffs, and rendered judgment for the latter for the balance, with interest thereon. To this the defendant excepted. So the only question before us is: Were the plaintiffs entitled to recover anything on the facts found?

The defence is predicated upon the doctrine, frequently approved by this Court, that a breach that goes to the essence of the contract operates as a discharge of it. This rule will not avail the defendant. It is not every breach that goes to the essence. It gives rise to an action for damages, but it does not necessarily justify a refusal to perform. Where, as here, the stipulation goes only to a part of the consideration, and may be compensated for in damages, its breach does not relieve the other party from performance. In such cases, the broken promise is an independent undertaking and not a condition precedent. *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *Lowber v. Bangs*, 2 Wall. 728, 17 L. ed. 768. See *Rioux v. Ryegate Brick Co.*, 72 Vt. at p. 155, 47 Atl. 406. In order to operate as a discharge or give rise to a right of rescission, the partial failure to perform must go to the very root of the contract. *Chamberlin v. Booth*, 135 Ga. 719, 70 S. E. 569, 35 L. R. A. (N. S.) 1223. *Keenan v. Brown*, 21 Vt. 86, is a case of

partial failure of performance, and it was held that the defendant therein was not absolved thereby, and was only entitled to recover his damages.

Moreover, when a contract has been partly performed by one party, and the other has derived a substantial benefit therefrom, the latter cannot refuse to comply with its terms simply because the former fails of complete performance. *Kauffman v. Raeder, supra*; 13 C. J. 659. "Where a person has received a part of the consideration for which he entered into the agreement," says Mr. Serjt. Williams, "it would be unjust that, because he has not had the whole, he would therefore be permitted to enjoy that part without either paying or doing anything for it." 1 Saund. 320 d. *Hammond v. Buckmaster*, 22 Vt. 375, is a case of this class, and it was therein held that, inasmuch as each party had received a partial benefit from the contract and could not be placed in *statu quo*, the defendant would have to perform the contract, seeking his damages for the plaintiff's breach by cross-action. These holdings are decisive of the case in hand. The stipulation in question was only a part of the consideration of the defendant's undertaking; was subordinate and incidental to its main purpose; its breach is compensable in damages; and the defendant obtained and now holds a substantial benefit under the contract. Other questions argued need not be considered. The judgment below is without error and is

Affirmed.

IN RE FRANCIS KETCHUM.

January Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 25, 1918.

New Trial—Disqualification of Juror.

After conviction of respondent of murder in the first degree, it appeared that one who had served as a juryman at the trial had, soon after

the shooting, gone to the place where the dead body was found, as an undertaker's assistant, and had helped in removing the body to the undertaking rooms, and thus had had opportunity of observing the position of the body and its appearance, height and weight, all of which matters were issues on trial. On petition for new trial *held*, the verdict should be set aside and a new trial granted.

Every petition for a new trial brought conformably to law must fall or prevail according to the strength of its appeal to the judgment and conscience of the Court.

PETITION for new trial, heard at the February Term, 1918, of Supreme Court, on petition, and affidavits in support thereof. Petitioner was convicted of the crime of murder in the first degree at the June Term, 1917, Bennington County. The opinion states the case.

Collins M. Graves for petitioner.

Herbert G. Barber, Attorney General, and *Frank S. Archibald*, State's Attorney, for the State.

HASELTON, J. Francis Ketchum, the petitioner, was at the June Term, 1917, of the Bennington county court, convicted of the crime of murder in the first degree and the sentence of the law was duly imposed. That sentence provides that the petitioner be put to death by electrocution during the week of Monday next after the first day of March, 1918. The formal sentence need not be recited here. The trial was conducted by the court with eminent fairness, as the official transcript shows, and the respondent therein, the petitioner here, brought no bill of exceptions to this Court. One of the defences on trial was that of insanity, of which the State was given notice some months before the trial. On trial that was the principal defence, though the question of whether, if the petitioner was guilty of a felonious homicide, he was guilty of manslaughter, of murder in the second degree or murder in the first degree was necessarily in the case and was carefully treated by the court in its charge to the jury. The evidence, too, was such that the court felt called upon to charge upon the doctrine of self-defence. At the January Term, 1918, of this Court, this petition was heard on the sole ground

that it originally set up, that of newly discovered evidence of insanity on the part of the petitioner. A few days after the adjournment of the January Term, the petition was amended so that it set up as a further ground for a new trial facts and circumstances newly discovered relating to the fitness of one of the jurymen, F. H. Ferguson, to sit in the trial of the cause. No question is made or can be made that the facts and circumstances relied on in the amendment to the petition were unknown to the petitioner and his counsel, and also to the representatives of the State, until after the trial; nor was the failure to learn of these facts and circumstances, before they were brought to light, due to any lack of diligence on either side.

The conviction of the petitioner was for the murder of one William Costello, September 16, 1916. In the evening of that day, at a place near the grounds of the Soldiers' Home, where the track of a trolley car line crosses a highway, the dead body of Costello was found. On the trial facts and circumstances as to its condition, location and appearance were testified to, with very considerable particularity, by various witnesses called by the State. After the introduction of the evidence as to such and other facts and circumstances the State introduced evidence of two oral confessions made by the petitioner, in both of which he confessed that he shot and killed Costello on the evening in question at the place where the body of Costello was found. On trial the petitioner took the witness stand in his own behalf and admitted the shooting and killing.

Before making further reference to the evidence we may here logically point out the situation in which the jurymen Ferguson stood with reference to his ability to try each and every issue in the case solely upon the evidence given in open court. In his examination on the *voir dire* the jurymen gave apparently fair answers to the precise questions put to him, taking such questions in a strictly literal sense. Those questions elicited nothing more with regard to his knowledge of the crime alleged, or any matter connected with it, than that a few days after the crime was committed he heard it talked about on the street, and, as he presumed, participated in conversation so had and may, possibly, have heard persons in such conversation attempt to go into the details as they were alleged to have happened, had, as he presumed, read whatever account appeared in the *Bennington Banner* at the time. His statements on the *voir dire* suggested

no reason whatever why he was not in every way a person qualified to sit with propriety in the trial of the case.

We turn now to the affidavits relating to the amendment to the petition for a new trial.

Roy Paddock of Bennington deposed that he is by occupation an undertaker, and that the juryman, Ferguson, occasionally assists him. He goes on to say that he remembers the night, in September, 1916, when William Costello was shot, that he received word to go to the place of the shooting, that he immediately called Mr. Ferguson by telephone, met him at the Walbridge undertaking rooms and drove in an ambulance with Mr. Ferguson and one Charles Percey to the scene of the shooting. Continuing the deponent says: "Said Ferguson and I left the ambulance, taking with us a stretcher, and went to the place where the body of Costello was lying on the ground. We remained there a few minutes, then placed the body upon a stretcher, and to the best of my recollection Ferguson, Percey, police officer Hurley and I carried Costello's body on the stretcher to the ambulance. Said Ferguson, Percey and I then drove to the Walbridge undertaking rooms and we then placed said body in said rooms. Ferguson and I remained for about one-half hour in and about the room where said body lay, although I cannot recall the exact length of time Ferguson remained in the rooms after the body was brought in."

As the deponent Paddock was a witness in the case, and we shall have occasion to refer to his testimony, we note here that in his affidavit, he further says that at the trial he saw Ferguson sitting as one of the jurors.

Charles Percey, referred to in the foregoing affidavit, makes an affidavit in which, referring to the night in which Costello was shot, he deposes as follows: "I received word from F. H. Ferguson of said Bennington that Roy Paddock wished me to accompany him to the place of the shooting. Said Ferguson, Paddock and I drove in an ambulance to the scene of the shooting, remained there for several minutes. I then assisted the said Ferguson, Paddock and police officer Hurley in taking Costello's body from the ground and carrying it on a stretcher to the ambulance. Said Ferguson, Paddock and I then drove in the ambulance to the Walbridge undertaking rooms and put the body in said rooms."

his affidavit, he saw Ferguson sitting as a juryman in the trial of the case. Officer Hurley, who according to the affidavits of Paddock and Percey assisted them and Ferguson in carrying the body of Costello from the ground where it lay to the ambulance, testified to the taking of the body to the undertaker's rooms, and being asked: "Who carried it to the undertaker's?" replied: 'LeRoy Paddock with a driver.' Hurley made no mention of Mr. Ferguson. Officer Griffin was the first officer at the scene of the tragedy, and as he testified, remained there until the body was put into the undertaker's wagon. Being asked: "The undertaker who came down was who?" he replied: "Mr. Paddock was one, I don't know the other." It is of course, possible that the witness did not know Mr. Ferguson, but as it is clear that Mr. Ferguson went down with Paddock and Percey, it is quite probable that in answering as he did, officer Griffin referred to Paddock and Percey, and felt warranted in not mentioning juryman Ferguson's name on the ground that the inquiry was as to who was the undertaker, whereas Ferguson was not strictly an undertaker though the undertaker sometimes called on him for assistance. However, this may be, the fact that certain witnesses, who naturally would have mentioned Ferguson's name in answer to inquiries put to them, did not do so points to a feeling on their part that he was in an embarrassing and improper position sitting as a juryman. No doubt they felt that, while omitting mention of his name, they were stating everything material to the matters inquired about.

In point of fact, however reliable and just a person Mr. Ferguson may be, he was not a fit person to sit in the trial of this case. If he was, a jury made up entirely of persons who gathered at the scene of the tragedy in the course of the evening of its enactment, while the body with its blood-smeared face was lying there on the bloody ground, each gathering some detail as to what had happened, would have been a fit and lawful jury. The thought of such a jury is abhorrent to the administration of justice.

It is to be remembered that we are not dealing with a case in which a respondent, about whose sanity no question is made, takes the witness stand and admits that he is guilty of the very crime of which he is convicted. The petitioner was convicted of the crime of murder in the first degree. What he admitted was that he committed homicide in the killing of William Cos-

tello. Whether he was sane or insane, and whether, if, the killing was felonious, the petitioner was guilty of manslaughter, of murder in the second degree, or of murder in the first degree, remained for the jury to determine, under the law as given them, on all the evidence in the case direct and circumstantial, and upon nothing but the evidence given in open court in the presence of the respondent, the petitioner here.

Counsel for the State refer us to several cases in which petitions for a new trial have been denied notwithstanding some unfitness or impropriety on the part of jurymen. But this case is broadly distinguishable from any case cited and from any well reasoned case that has come to our attention. And it must be said that every petition for a new trial, brought conformably to law, must fail or prevail according to the strength of the appeal which it makes to the judgment and conscience of the Court.

We deem it inadvisable to consider that branch of the petition which asks for a new trial on the ground of newly discovered evidence of insanity. And, for obvious reasons, we have not stated nor commented upon the trial any further than was necessary to a demonstration that such trial was a mistrial.

Petition granted, verdict, judgment and sentence set aside, and new trial ordered.

STATE v. MRS. TONY AVICOLLI.

January Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 27, 1918.

Evidence—Admissibility—Trial—Argument of Counsel.

In a prosecution for the illegal sale of intoxicating liquor, evidence that persons, some of whom were "river drivers," were seen on different occasions going to respondent's house, having no apparent business there, is admissible.

The reception of evidence bearing upon a certain issue is not rendered reversible error by the fact that the party offering it fails to make out such a case upon the issue as justifies the court in submitting the question to the jury.

No error can be imputed to an argument of counsel based upon evidence which has been properly received.

INFORMATION for the illegal sale of intoxicating liquor. Plea, not guilty. Trial by jury at the Special May Term, 1917, Windsor County, *Stanton J.*, presiding. Verdict, guilty. Respondent excepted. The opinion states the case.

Charles Batchelder for respondent.

William S. Pingree, State's Attorney, for the State.

MILES, J. This is an information charging the respondent with selling, furnishing and giving away intoxicating liquor without authority. The transcript is made the bill of exceptions, and, while many exceptions were taken during the trial, only three were relied upon in the respondent's brief. One was to the admission of evidence that persons were seen going, on different occasions, to the dwelling house where the respondent resided and where it was claimed that intoxicating liquor was sold, furnished and given away, having no apparent business at her house; and another exception was to the admission of testimony that some of those persons were "river drivers." The ground of objection to the reception of such evidence was as follows: "I do not see, if the court please, how it can shed any light on any legitimate issue to prove people went there or they were of a certain vocation or anything of the kind."

The third objection and exception was to the argument of the State's attorney based upon the evidence objected and excepted to as above stated, and the ground of the objection to the argument was the same as that urged by the respondent under its objection to the evidence. If there was no error in receiving the evidence, it follows that there was no error in permitting the argument. The point of the objection is that the evidence was immaterial.

In the case of *State v. Pierce*, 88 Vt. 277, 92 Atl. 218, a case for illegal liquor selling, evidence that one of the persons to whom

the respondent was charged with selling and who lived only a short distance away, and who was on various occasions at the respondent's dwelling house, where the alleged sales were made, more or less intoxicated, and at one time so drunk he could not stand, was held to be admissible, the Court saying: "It tended to characterize the place and the business there carried on." To the same effect is *State v. Krinski*, 78 Vt. 162, 62 Atl. 37.

The evidence objected to in this case tended to characterize the place as a resort for persons having no visible business there and this in connection with other testimony, not objected to, that the dwelling house in which the respondent was alleged to have sold and furnished intoxicating liquor, was away from the main street and had a well beaten path to it in the rear and in front of it, had a tendency to make it more probable that the persons going there were in pursuit of the same object that the evidence of the State tended to show induced others to go there. It was a circumstance to be weighed by the jury and "was within the wide latitude allowed in the reception of circumstantial evidence in criminal cases." *State v. Rider*, 80 Vt. 422, 68 Atl. 652.

The State's attorney evidently tried the case on the theory, that, if he failed to establish a sale of intoxicating liquor at the dwelling house of the respondent, he might be able to prove that it was furnished at that place, and hold the respondent liable therefor because of her house becoming a place of public resort; and, though he failed to make out such a case as justified the court below in submitting that question to the jury, it nevertheless did not make the reception of that evidence reversible error.

The evidence being properly received, there was no error because of the State's attorney's argument.

Judgment that there is no error in the proceedings below and that the respondent take nothing by her exceptions. Let execution be done.

STATE v. EDWARD EATON.

January Term 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 27, 1918.

Adultery—G. L. 7005, 7006—Sufficiency of Information—Motion in Arrest.

The word "adultery" as used in G. L. 7005, which fixes the penalty for the offence, means the crime as defined by G. L. 7006, and not the crime at common law.

In an information charging a male respondent with adultery with a person named, the fact that the *particeps criminis* is a woman not his wife is implied, because respondent could not commit adultery with his wife, nor with a person not a woman.

An information charging a married man, having a lawful wife living, with adultery, need not allege whether or not the *particeps criminis* is married or single.

As against a motion in arrest, argumentative allegations in an information are sufficient.

An information is aided by a verdict of guilty, as against a motion in arrest, as to all facts implied from those expressly alleged therein, which it was necessary for the State to show in order to obtain a conviction.

State v. Searle, 56 Vt. 516, distinguished, and *State v. Bisbee*, 75 Vt. 293, disregarded.

INFORMATION FOR ADULTERY. Plea, not guilty. Trial by jury at the Special June Term, 1917, Windsor County, *Stanton*, J., presiding. Verdict guilty. After verdict and before judgment, respondent moved in arrest of judgment, for that the information was fatally defective in that it failed to allege whether the *particeps criminis* was married or single, or, in fact, that she was a woman. Motion overruled. Respondent excepted.

The information alleged that respondent "being then and there a married man, and having a lawful wife then in life, did carnally know one Rena M. Brittell and with her did commit adultery contrary to the form, force and effect of the statute in

as implied from those expressly alleged, and the information is aided by the verdict. *State v. Freeman*, 63 Vt. 496, 22 Atl. 621; *Baker v. Sherman & Miller*, 73 Vt. 26, 50 Atl. 633; *Benedict v. Union Agricultural Society*, 74 Vt. 91, 51 Atl. 110.

Judgment that there is no error in the proceedings, and that the respondent takes nothing by his exceptions. Let execution be done.

STATE v. RENA M. BRITTELL.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed February 27, 1918.

New Trial—Newly Discovered Evidence—Sufficiency.

The question raised on motion in arrest in this case is decided in *State v. Eaton*, ante p. 291 and that decision is controlling.

A new trial will not be granted, as a general rule, when the newly discovered evidence relied upon only tends to discredit or impeach an opposing witness, especially if it is denied by the witness sought to be impeached; but this rule is subject to exception, and is in the control of the Court, which will not grant a new trial unless it is reasonably certain that injustice has been done and that the result of a new trial will be different.

Where a petition for new trial brought by respondent after conviction of adultery was supported by the affidavit of respondent's minor daughter to the effect that a certain part of the latter's testimony given on trial against respondent was untrue, and by the affidavits of two others that respondent's daughter had told them, after the trial, that she had been persuaded to testify falsely, *held*, in view of a subsequent affidavit of respondent's daughter, retracting her former affidavit, of the fact that her testimony was corroborated on trial by that of other witnesses, and of other circumstances in the case, that it could not be said that it was reasonably certain that injustice had been done, and that the result of a new trial would be different, and the petition should be dismissed.

Cas. 1917 A, 702), so as to consist of sexual intercourse between a man and a woman, one of whom is lawfully married to a third person, both participants being guilty of that offence. It is in this broader sense that the word "adultery" is now used in the section of the statute fixing the penalty.

It is apparent from what is said in the Bisbee case that in coming to the decision there reached, the Searle case was regarded as controlling, the Court by mistake understanding it was based upon the same statute. By reason of this mistake, the force of the holding in the Bisbee case, as a precedent, is practically negatived, and we so treat it.

Recurring to the information in the present case, it alleges that the respondent, being a married man and having a lawful wife living, "did carnally know one Rena M. Brittell and with her did commit adultery," etc. The words "did carnally know" constitute an express allegation of sexual connection with the person named, and when taken with the words, "and with her did commit adultery," the allegation is complete that the respondent, a married man and having a lawful wife then living, did have sexual intercourse with one Rena M. Brittell, (argumentatively) a woman not his wife. The latter is implied, for he could not commit adultery with his wife, nor with a person not a woman. In *Gorman v. Commonwealth*, 124 Pa. 536, 17 Atl. 26, the crime was charged substantially as it is in the information before us: that the respondent, a married man and having a lawful wife alive, did commit the crime of adultery with one E. C., by then and there having carnal knowledge of her body, etc. But there was no allegation that E. C. was not the respondent's wife. It was held that the word "adultery," used in the indictment, necessarily implied that the alleged E. C. was not his wife. See also *Helfrich v. Commonwealth*, 33 Pa. St. 68, 75 Am. Dec. 579. It being alleged that the respondent was a married man and having a wife then living, it is not material to the crime, and therefore not material to allege, whether the *particeps criminis* was married or single: for be it either way, the crime committed is adultery under the enlarged sense of that term now given by statute. As against a motion in arrest, argumentative allegations are sufficient. *State v. Clark*, 83 Vt. 305, 75 Atl. 534, Ann. Cas. 1912 A, 261.

Moreover, in order to entitle the State to a verdict of conviction, it was necessary for it to show all the facts stated above

as implied from those expressly alleged, and the information is aided by the verdict. *State v. Freeman*, 63 Vt. 496, 22 Atl. 621; *Baker v. Sherman & Miller*, 73 Vt. 26, 50 Atl. 633; *Benedict v. Union Agricultural Society*, 74 Vt. 91, 51 Atl. 110.

Judgment that there is no error in the proceedings, and that the respondent takes nothing by his exceptions. Let execution be done.

STATE v. RENA M. BRITTELL.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

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Where a petition for new trial brought by respondent after conviction of adultery was supported by the affidavit of respondent's minor daughter to the effect that a certain part of the latter's testimony given on trial against respondent was untrue, and by the affidavits of two others that respondent's daughter had told them, after the trial, that she had been persuaded to testify falsely, *held*, in view of a subsequent affidavit of respondent's daughter, retracting her former affidavit, of the fact that her testimony was corroborated on trial by that of other witnesses, and of other circumstances in the case, that it could not be said that it was reasonably certain that injustice had been done, and that the result of a new trial would be different, and the petition should be dismissed.

INFORMATION for adultery. Plea, not guilty. Trial by jury at the Special June Term, 1917, Windsor County, *Stanton*, J., presiding. Verdict, guilty. After verdict and before judgment respondent moved in arrest of judgment, for that the information contained no allegation that the *particeps criminis* was not the husband of respondent. Motion overruled. Respondent excepted.

After hearing in Supreme Court, respondent brought a petition for new trial, on the ground of newly discovered evidence. The opinion states the case.

Millward C. Taft for respondent.

William S. Pingree, State's Attorney, for the State.

MILES, J. This is an information charging the respondent with adultery. The case was tried by jury and a verdict was rendered against the respondent. After verdict and before judgment a motion in arrest was filed by the respondent, on the ground that the information contained no allegation that the parties to the alleged crime were not husband and wife.

In the case of *State v. Edward Eaton*, 92 Vt. 291, 102 Atl. 1025, handed down at the February Term of this Court, 1918, the jury, in the court below, found the respondent guilty of having committed adultery with the respondent in this case; and in this case the jury have found the respondent guilty of having committed the crime of adultery with the said Eaton; and the question raised here is decided in the opinion handed down in that case and that decision controls this case.

Judgment that there is no error in the proceedings below and that the respondent take nothing by her exceptions.

ON PETITION FOR NEW TRIAL

After the case was argued in Supreme Court the respondent brings her petition for a new trial, supporting the same by the affidavit of Hazel M. Brittell, daughter of the respondent, a girl fourteen years of age, who was a witness on the trial of the respondent in the court below, and supported also by affidavits of William Holmes, of Dora Holmes, wife of said William Holmes, of the respondent and of her attorneys.

On the trial of the case in county court, Hazel M. testified, among other things, in substance as follows: That some time in 1913 she went with her mother and a little brother to Hanover, New Hampshire; that her mother, for about two months, worked for Mrs. Atkins at Hanover, when Edward Eaton, the man with whom the respondent is charged with having committed adultery, came there, and her mother and little brother went with him to Lebanon, New Hampshire, and her mother and brother did not return until about a week after they went away; that upon her mother's return the respondent took what goods she had at Atkins' and went to Hartland, Vermont, she and her brother going there with her; that they went to the house of one Elton Briggs, and there commenced housekeeping, describing the house as follows: "Downstairs you go into the front door and you go right into the kitchen, turn to your right and go into the parlor, and from there go into the bedroom, and while you are in the kitchen you turn to your right and go right upstairs, and two bedrooms upstairs, about—as far as I can remember, they are right across the hall from each other."

The witness then testified that she occupied one of the rooms upstairs with her little brother and her mother occupied the other room with Eaton; that she knew that fact because her mother and Eaton always went in there together at night; that there was only one bed in the room; that they stayed at the Briggs house about two months, when they went to what she called the Daley house, near by and on the same street. The witness then described that house with particularity and stated the persons occupying the rooms on the second floor. She testified that the respondent and Eaton slept in the bedroom downstairs having only one bed in it; that she had been in that room when Eaton and the respondent were there in their night clothes; that the family stayed at the Daley house about a year; that the respondent left there suddenly with the witness and her brother and they went from there to Ticonderoga; that Eaton remained behind to pack and ship the goods which later came to Ticonderoga; that Eaton came there later and occupied a bedroom with the respondent; that when they lived at the Daley house she had seen the respondent and Eaton in bed together.

On cross examination the witness testified that she and her brother were supported by the respondent and Eaton, when at Hanover and the year following; that Eaton stayed with them,

worked at the mill and bought the "stuff" for the house and paid nothing for his board; that when at the Briggs house and when they got there the respondent called Eaton her husband and Eaton introduced her as his wife, and that she and her brother called him papa and that Eaton spoke of her and her brother as the children, and at the Briggs house they all lived together as one family and that she tried to make them think that Eaton was her father, and that she continued to do so as long as they lived in Hartland.

The material statement in the affidavit of the respondent attached to the petition is a denial of the testimony of Hazel M., that the respondent and Eaton occupied the same room and bed when she was living in North Hartland, Vermont. The material statements in the affidavit of Hazel M. Brittell are, that on the trial of the respondent in county court she was persuaded by her father, William Brittell, and her uncle Hayes Brittell, to testify that she had seen her mother in bed with Mr. Edward Eaton; that that testimony was not true; that while living with them at North Hartland she had no suspicion that anything was wrong in the conduct of her mother toward Eaton and that she did not then and she does not at the present time believe them to be guilty of adultery; that it was because of the influence of her father and uncle Hayes that induced her to testify against her mother in county court as she did testify and that she made the affidavit freely and voluntarily and without influence, either by love or fear, but to do what was right and to undo the wrong that she had done; that she and her mother slept together during all the time they lived at the Daley and Briggs houses. The affidavit of William W. Holmes and his wife, Dora Holmes, are substantially the same, that Hazel M. told them, after the trial and conviction of the respondent, that she was persuaded at the time of the trial by her father and others to testify falsely and that she never knew of anything wrong between her mother and Eaton, and that she believed the respondent to be innocent of the crime of adultery; that she told this to them of her own free will and accord. The affidavits of the attorneys for the respondent were with respect to the diligence which they used in preparing the case for trial and that the facts stated in the affidavits were unknown to them on the trial in county court. The affidavit of the respondent attached to the petition is practically a reiteration of her testimony on the trial in county court.

The petition, strictly speaking, is not a petition for newly discovered evidence; but is a petition for a new trial because of a judgment obtained by false testimony, and the evidence by which the petitioner seeks to obtain a new trial is simply impeaching testimony. In *State v. Fogg*, 74 Vt. 62, 52 Atl. 272, this Court say: "It is a general rule that, when the new evidence only tends to discredit or impeach an opposing witness, it will not avail as a ground for a new trial, especially if this evidence is directly denied by the witness sought to be impeached." Further along in the opinion it is said: "An examination of many cases shows that the general rule is subject to exceptions, and is in the control of the court, which will not grant a new trial unless it is reasonably certain that injustice has been done and that the result of a new trial will be different."

This case, we think, lays down the true rule in cases of this character, and the inquiry here: Do the affidavits make it "reasonably certain that injustice has been done and that the result of a new trial will be different?"

In answering this question it should be noticed that Hazel does not say, either in her affidavit or in her declarations as testified to by Mr. and Mrs. Holmes, that her whole testimony is untrue. All that she denies of her testimony in county court, in her affidavit attached to the petition, is that she had not seen her mother in bed with Eaton; that she never heard Eaton introduce her mother as his wife nor refer to her as such, and that she and her mother slept together during all the time they lived at the Daley house and the Briggs house. The only change in her testimony in county court stated in the affidavits of Mr. and Mrs. Holmes is that she testified falsely in county court and never knew of anything wrong between her mother and Eaton. The rest of her testimony she leaves as given in county court. Not only was much of the testimony of the witness, at the trial in county court, uncontradicted by her affidavit attached to the petition, but, after that affidavit was given, she gave another in which she stated that she made the affidavit attached to the petition under the persuasive influence and pleading of the respondent; that after the trial in county court, on August 11, 1917, she went to reside in Woodstock, Vt., and was with her mother during a part of nearly every day for some months; that during a part of the month of August, while in Woodstock, the respondent frequently talked with her about the case and begged of her

to change her story to help her out of jail; that during these talks her mother cried and she cried and was much stirred and her sympathy was aroused to help her mother, if she could, and while in this state of mind she was called upon by an attorney who had assisted in the defence of the respondent at the trial in county court, who asked her if she wanted to change her testimony given in county court, and she told him that she did and that it was then that she made the affidavit attached to the petition; that she made the affidavit because of her love for her mother and because she then fully expected if the sentence was imposed her mother would be sent to prison and that she changed her story to save her mother from a sentence to imprisonment in State's Prison; that the testimony given by her at the trial, in county court, was true, and was given of her own free will and not because her father or uncle had asked her to so testify against the respondent.

In the counter affidavit of William D. Brittell, father of Hazel M., he emphatically denies that he ever influenced the testimony of Hazel M., given at the trial in county court, but on the contrary thereof, affirms that he urged her to tell the truth; and the uncle in his affidavit denies that he ever endeavored to influence her in her testimony given on the trial of the respondent.

The State's attorney, who conducted the prosecution of the respondent, in his counter affidavit, affirms that the father of Hazel M., in the State's attorney's presence, urged Hazel M. to tell the truth and the whole truth and that he, the affiant, also told her to tell the truth and nothing but the truth, and that the witness testified of her own free will and gave substantially the same testimony at the preliminary hearing as she gave in the county court; that from his own observation Hazel M., is very fond of her mother and that William D., her father, did not refuse to let Hazel M., see her mother while she was confined in the lockup in White River Junction, but he did insist that she should not go into that lockup alone, to see her mother, where she and Edward Eaton were both incarcerated; and that she was permitted to see her mother in company with her father.

Much of the testimony of Hazel M. given on the trial in county court was corroborated by other witnesses. Her description of the houses was corroborated by all the testimony bearing upon that subject. Elton Briggs, to whose house the respondent

went in company with Edward Eaton, testified that when the respondent came to his house she came there as the wife of Eaton; that they occupied the same sleeping room at his house and that Hazel M. and her brother occupied a room together; that they stayed at his house about three weeks; that when the respondent and Eaton came there, Eaton, who was a relative of Briggs' wife, introduced the respondent as his wife; that the introduction to Briggs' wife was: "I'll make you acquainted with my wife."

On the trial of the case in county court Dennis K. Daley testified that he was in the meat business during the time that she lived in Hartland and sold her meat from time to time and that he also knew her as Mrs. Eaton and that in Hartland she went by the name of Mrs. Eaton; that he was at that time a deputy sheriff and at the time the respondent left Hartland a warrant had been placed in his hands for the arrest of these people and that very shortly after receiving the warrant the family left Hartland; that the respondent left the morning of the day he received the warrant; that when he rented the house he supposed it was being rented to Mr. and Mrs. Eaton; that Eaton came to his store and purchased meat or something that he had for sale; that when he spoke to the respondent he addressed her as Mrs. Eaton and that she never denied but that she was Mrs. Eaton. The station agent of North Hartland, on the trial in county court, testified that Eaton arranged for the shipment of the goods to Ticonderoga to Mrs. Eaton; that she had met the respondent and Eaton on various occasions and always addressed them as Mr. and Mrs. Eaton and that she did not know of their going by any other name. Russell Unwin testified at the trial in county court that for two or three weeks he boarded at the Daley house and that while there he addressed the respondent as Mrs. Eaton and that she never told him that she wasn't Mrs. Eaton. Other testimony in the case, not herein referred to had a tendency, more or less, to corroborate the testimony of Hazel M. given on the trial in county court. She was cross examined at great length without her testimony being broken down in any degree and many things were called out during that cross-examination which were not alluded to in her direct examination, which apparently had not come to the attention of the State's attorney before the witness was produced upon the stand. Among such matters was her testimony that

she and her brother were supported by the respondent and Eaton when at Hanover, New Hampshire, and for the next year following; that Eaton stayed with them and bought the "stuff" for the house and that she and her brother called Eaton papa and the respondent called him her husband and that Eaton spoke of the respondent as his wife and that the witness continued to call him papa as long as they lived at Hartland.

It seems to us that if the father of Hazel M. or her uncle had known what the witness would testify about these matters called out on cross-examination, they would have informed the State's attorney of that fact and he would have called them out in the direct examination of the witness; besides, the witness, a girl of only fourteen years of age, who had lived with her mother up to a very short period of time before the trial of the case in county court, could not well have been induced to testify against her mother to facts which were not true and which she knew to be of so much importance to the respondent; and if not induced, as an abundance of evidence in the case tends to show she was not, a hostile feeling against Eaton could not well be assigned as a reason for giving testimony against her mother. On the other hand it is easy to perceive, that closeted with her mother weeping and pleading, how natural it might be for a girl of her tender age to be persuaded to come to her relief; and it is but natural that when that influence was removed and sober thought came to her of the consequences of committing perjury, that she should give the counter affidavit taken by the state.

From a careful examination of the transcript it is clearly apparent to us that, when testifying in the absence of influence, her testimony given on the trial in county court is substantially true. She has related it on three different occasions, without any substantial contradiction, once at the preliminary hearing, again at the trial in county court and again in her counter affidavit, besides relating the same facts under a rigid cross examination without any substantial contradiction in her statements. If a new trial were to be granted, so far as anything appears in support of the petition, another trial would only differ from the trial at which the respondent was convicted to the extent of the impeachment of the witness' testimony on account of her statement to Mr. and Mrs. Holmes and her affidavit attached to the petition for a new trial, which, weighed in the light of the influence of the importunities, the love of her mother

and the disgrace which her conviction would cast upon her, must at most be very slight in the minds of the jury as affecting her testimony, supported as it was by other witnesses. With all these matters standing out in corroboration of the testimony of the witness on the trial in county court we are unable to say that "it is reasonably certain that injustice has been done and that the result of a new trial will be different."

The petition is dismissed. Let execution be done.

HELEN ELIZABETH WHITAKER v. FRED WHITAKER.

October Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed March 4, 1918.

Divorce—Gross or Wanton and Cruel Failure to Support— P. S. 3068.

In order to entitle a wife to a divorce for gross or wanton and cruel failure to support, under P. S. 3068, something more is required than mere desertion, though wilful, or simple neglect or refusal to support; a wife who bases her application upon this ground must establish some circumstance of indignity or aggravation characterizing the husband's conduct to bring her case within the terms of the statute.

In a proceeding for divorce on the ground of gross and wanton and cruel failure to support, the trial court dismissed the petition, and in the findings of fact stated that the defendant seduced the plaintiff, and, having failed to obtain her consent to an illegal operation, married her, remained with her for one night, and then left her, promising to pay for her board, but, although possessing funds, never contributed to her support, and that the plaintiff was in poor health and compelled to undergo an operation. The findings did not expressly state whether defendant's conduct was gross or wanton or cruel. *Held*, although it would ordinarily be assumed in support of the judgment that the trial court inferred

that the conduct was not of that character, under the circumstances, in the exercise of the discretion of the Supreme Court, the case would be remanded for a rehearing.

PETITION for divorce, on the ground that the libellee, although of sufficient pecuniary and physical ability so to do, without cause, grossly, wantonly and cruelly refused and neglected to provide suitable maintenance for libellant. The proceeding was uncontested. Trial at the June Term, 1917, Caledonia County, *Fish, J.*, presiding. After hearing, the court dismissed the petition. Libellant excepted. The opinion states the case.

Dunnett, Shields & Conant for libellant.

POWERS, J. This is an uncontested petition for divorce based upon an alleged neglect and refusal to support. The court below refused the application upon the sole ground that the facts shown constitute "nothing more than simple desertion." To this refusal plaintiff excepted.

The marriage, residence, service and the ability of the defendant, both physical and pecuniary, are found. It is also found that the defendant has wholly failed to support the plaintiff, and that she has been without fault. The only question before us is whether such failure to support was "gross," or "wanton and cruel" within the meaning of P. S. 3068.

That something more than mere desertion, though wilful, is required to entitle a wife to a divorce under this provision of the statute is too plain to require discussion. Equally plain is it that something more than simple neglect or refusal to support is necessary. Both of these propositions are firmly established and adhered to in this jurisdiction. *Mandigo v. Mandigo*, 15 Vt. 786; *Caswell v. Caswell*, 66 Vt. 242, 28 Atl. 988. To hold otherwise would be to ignore the qualifying terms of the statute. "Gross" means flagrant, shameful, not to be excused. Webster's Dict. So "Grossly" must mean flagrantly, shamefully, inexcusably. Accordingly, when gross neglect of duty is made a statutory ground of divorce, it is held that the neglect must be so glaring, flagrant, shameful or monstrous as to be obvious to the common understanding and inexcusable under all the relevant facts. *Beauchamp v. Beauchamp*, 44 Okl. 634, 146 Pac. 30.

Without attempting to do more than state the rule broadly, it is safe to assert that a wife who bases her application upon the ground of nonsupport must establish some circumstance of indignity or aggravation characterizing the husband's conduct to bring her case within the terms of the statute. "Without doubt," says Judge Thompson in *Caswell v. Caswell*, *supra*, "under some circumstances, a sudden and continued refusal to provide the necessities of life to a wife who is thereby left to her own earnings, would be within the statute meaning of 'grossly or wantonly and cruelly' refusing or neglecting to support; as where, from the previous habits or mode of life, or state of health, or incapacity to labor from any cause, such conduct would cause injury to health or danger of such injury, or reasonable apprehension thereof. So, too, the refusal might be made in such a manner, or coupled with such indignity or aggravation as, in and of itself, to be a gross or wanton and cruel refusal or neglect to support the wife." We have quoted this language at some length as it is taken almost literally from *Peabody v. Peabody*, 104 Mass. 195.

The findings show that these parties had sexual intercourse before they were married. The plaintiff was then fifteen years old and the defendant was twenty-one. The plaintiff was advised by her physician that she was pregnant, and believing this to be true, she informed her mother of the fact. The mother talked it over with the defendant, who proposed to take the girl to New York and have an illegal operation performed. This was refused. He then expressed a willingness to marry the girl, and they were married, the mother consenting. At this time the plaintiff was living in the family of a stepfather. The defendant stayed with his wife one night only, and within a week left for a distant part of the state,—the plaintiff remaining with her mother under a promise by the defendant to pay her board. He had inherited something over two thousand dollars about seven years before this marriage, which inheritance was then turned over to a guardian. There is nothing to show that this money or any substantial part of it had been used up. He claimed and appeared to have money, and from time to time had checks for substantial sums. He never paid for his wife's board and never contributed to her support, though she repeatedly called upon him by telephone and by mail to do so. Soon after her marriage, the plaintiff learned that she was not in

the family way, but whether she so informed the defendant does not appear. Shortly after the latter left her, the stepfather told the plaintiff that she could stay at his house but two weeks longer, and she called up the defendant and told him about it and asked him to provide a place for her, expressing a willingness to go to any place he might select. She has been in poor health since the marriage, and underwent an operation at an expense of over a hundred dollars. When able, she has worked out as a domestic, and at other times has been dependent on relatives and friends.

These facts are abundantly sufficient to warrant the inference that this defendant, having seduced this child, and having failed to get her to consent to an illegal operation to produce abortion, married her to escape bastardy proceedings or a prosecution for a statutory rape, or both, then intending to desert her and leave her to shift for herself and her expected child; and when she was about to be driven into the street, he turned a deaf ear to her appeals, and left her broken in health and an object of charity.

The court has not expressly found whether the defendant's conduct was gross, or wanton and cruel. Ordinarily, we should, in support of the judgment, assume that the trial court inferred that it was not of that character. But in the circumstances shown, it seems to have been flagrant, shameless and inexcusable, and affords such evidence of gross, or wanton and cruel neglect that we think that the case should go back for an express finding on the vital question. So, without saying that the findings require a decree for the plaintiff as matter of law, we shall, in the exercise of our undoubted discretion in such cases, remand the case for a rehearing. This result is fully justified by *Canning v. Canning*, 88 Vt. 522, 39 Atl. 259.

Decree reversed, pro forma, and cause remanded for new trial.

JOHN E. DEYETTE v. EUGENIE DEYETTE.
EUGENIE DEYETTE v. JOHN E. DEYETTE.

November Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed April 12, 1918.

Courts—Jurisdiction—When Open to Inquiry—Annulment of Marriage — Judgment — Impeachment—Exceptions—Sufficiency—Custody of Minor Child.

The jurisdiction of a court of another state in granting a decree of annulment of marriage is open to inquiry in a collateral proceeding in a court of this State.

A judgment of annulment of marriage rendered in another state by a court having jurisdiction of the parties and of the subject matter cannot be impeached by either of the parties thereto in a collateral action, by reason of false testimony given at the time, even though given by a party.

The plaintiff in a proceeding for divorce has not such an interest in the matter of a judgment of a court of competent jurisdiction in another state annulling a former marriage of the defendant as entitles him to impeach it on the ground of false testimony given at the time.

Exceptions which require an examination of evidence not before the Supreme Court will not be considered.

In decreeing the custody of a minor child in divorce proceedings, the good of the child is the primary consideration and this can be judged to some extent by the comparative acts of the father and mother showing love and affection for it, and parental interest in its welfare; and so there was no error in decreeing the custody of a minor child of tender years to the mother, against whom a decree of divorce had been granted, when the father, on trial, had attempted to obtain a ruling invalidating the marriage, and so rendering the child illegitimate.

PETITION and cross petition for divorce. Heard together at the March Term, 1917, Chittenden County, *Butler, J.*, presiding. Decree granting the petition of John E. Deyette, dismissing the

petition of Eugenie Deyette, and giving the custody of the minor child of the parties to Eugenie Deyette. John E. Deyette excepted. The opinion states the case.

V. A. Bullard and John J. Enright for John E. Deyette.

Alfred L. Sherman and Rufus E. Brown for Eugenie Deyette.

WATSON, C. J. The petitioner, John E. Deyette, filed his petition for a divorce, and the petitionee, Eugenie Deyette, filed her cross petition. The two petitions were heard together. A bill of divorce was granted the petitioner for intolerable severity, and the cross petition was dismissed. The care and custody of the minor child was granted to the petitionee, and the petitioner was ordered to pay one hundred dollars per year to the petitionee toward the care and support of the child until she shall arrive at the age of sixteen years. The case is here on the petitioner's exceptions.

It appeared that the petitionee had previously married one Borst in the state of New York, and that a decree of annulment of that marriage had been granted by a New York court, on the ground that she was married to him prior to, and had not lived or cohabited with him as husband and wife since attaining, the age of legal consent. A certified copy of the record of those proceedings was introduced in evidence, and is made a part of the exceptions. It seems from that record that at the time those proceedings were instituted, all the parties thereto were domiciled in the state of New York, and no claim is here made to the contrary. The record shows that the process was personally served upon the defendant Borst within that state. It therefore appears that the New York court had jurisdiction of the parties and of the subject matter. Borst failed to appear in answer to the case, and was wholly in default. Those proceedings were brought, and the decree therein rendered, under a statute of that state permitting a marriage to be annulled when contracted by a party of less than eighteen years of age, provided the parties did not freely cohabit as husband and wife after such party had attained that age.

In the trial of the present case the petitioner sought to vitiate the New York decree, on the ground of fraud in its procure-

ment; and on this question he was permitted to show, subject to exception, that Eugenie and her mother there testified that the former was born on August 31, 1887, when in fact she was born on August 31, 1886; that in fact she was eighteen years of age on August 31, 1904; that she was married to Borst in the preceding October, and continued to live with him as husband and wife until the summer of 1905, and consequently they thus lived together for nearly a year after she attained the age of legal consent. The petitioner contends that the New York decree was therefore based upon fraud respecting an essential fact, by reason of which it is open to collateral attack, and is void.

That the question of jurisdiction of the New York court was open to inquiry is beyond doubt. *Domenchini's Adm'r v. Hoo-sac Tunnel & W. R. R.*, 90 Vt. 451, 98 Atl. 982. But the fraud shown did not go to the jurisdiction. We will assume that such a judgment rendered in that state may be impeached in a collateral action, for fraud; yet it can only be for fraud extrinsic or collateral to the matter tried in that action—it cannot be impeached by either of the parties thereto, by reason of false testimony given at the time, even though given by a party. *Camp v. Ward*, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929; *French v. Raymond*, 82 Vt. 156, 72 Atl. 324, 137 Am. St. Rep. 994. It is said, however, that the petitioner in the present action is a stranger to the foreign decree, and therefore he may impeach it collaterally, citing in support of this position *Blondin v. Brooks*, 83 Vt. 472, 76 Atl. 184. In that case the fraud was as to the domicile of the plaintiff to the action in which the foreign judgment was rendered, and went to the jurisdiction. This Court said the defendants in the case of *Blondin v. Brooks* were strangers to it, and that strangers can impeach a judgment collaterally “when it is for their interest to impeach it at all.” Granting (though not deciding) that a stranger to a judgment may impeach it for intrinsic fraud, if it be for his interest to do so, his “interest” must be such, at least, as concerns him in the collateral action wherein the impeachment is sought. Otherwise he is not aggrieved. In *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132, the defendant was married in the state of Massachusetts, to one Pomeroy. After living together there for some years, Pomeroy went to Chicago to procure a divorce for a cause not recognized by the laws of Massachusetts, and to evade the laws of that state. The defendant went to Chicago, appeared in

the action, and the parties, by collusion, procured to be entered and docketed a decree of absolute divorce. Later the divorced wife married Kinnier, and the action was brought by him to annul the marriage on the ground that the former marriage of the defendant was in force, and her divorce from Pomeroy was void in the state of New York. The case stood on demurrer to the complaint. It was held that the judgment of the Illinois court effectually divorced the parties to it, and their marriage was no longer in force in any legal sense; that the plaintiff in the New York action was not defrauded or injured by the foreign judgment. The court said: "The plaintiff was entitled to marry a marriageable person, and though she may not have been, in all respects, all he anticipated or all that was desirable, yet she was competent to marry, because her former marriage was not *then in force*, and being competent, it is of no legal consequence to the plaintiff how she became so. Conceding fraud as alleged, he cannot avail himself of it." In *Ruger v. Heckel*, 85 N. Y. 483, it was held that a second husband of a divorced woman could not maintain an action to have the decree divorcing her from her former husband cancelled and her second marriage declared void, on the ground that the proof upon which the court acted in granting the divorce was fabricated, and the decree of divorce fraudulently obtained.

We think it clear that the petitioner in the present action has no such interest in the matter of the foreign judgment as entitles him to impeach it on the ground of the fraud shown. The wisdom of this law is forcibly brought to mind by the circumstances of this case, where the petitioner is attempting, by such impeachment, to render his marriage with the petitioness void, and thereby illegitimatize their minor daughter of tender years, begotten and born in lawful wedlock, the fruit of the union. The law would be lacking in justice if it permitted such an inhuman undertaking to succeed.

Several exceptions were taken by the petitioner, the consideration of which requires an examination of evidence not before us as a part of the record. To such exceptions we pay no attention. The bill of exceptions had attached to it what is stated to be exceptions taken by the petitioner during the progress of the trial. We assume that this was done by the presiding judge, and that they were intended to be a part of the bill. They are so treated. The evidence offered to be shown by the

witness Loosemore, and by the witness Perry, and excluded by the court, does not appear to have been of sufficient consequence to require further notice.

Exception was taken to that part of the decree which gives the care and custody of the minor child to the petitionee, as unreasonable, in that it contemplates that the child will be taken out of the jurisdiction of the court, thus placing it beyond the power of the father to see the child as specified in the decree. Suffice it to say of this exception, that there is nothing about the decree indicating the contemplation here stated.

It is said that the court in effect found and decreed that the petitionee had been guilty of such intolerable severity toward her husband as to show her not a fit person to live with him; and if she has done ill in the marriage relation, she will be likely to do ill in the parental relation. Giving this all the force it is entitled to as an argument, it is far from controlling in view of the fact, among others, that the petitioner's love for the child is so small that it did not even deter him, on the trial of the facts in the court below, nor on exceptions in this Court, from strenuously attempting to procure a ruling that could not result otherwise than to render this same child an illegitimate, and relieve him of any liability for her support. The good of the child is the primary consideration, and that can be judged to some extent by the comparative acts of the father and the mother, showing love and affection for it, and a parental interest in its welfare. It is very apparent from the record that the court below committed no error in decreeing the care, custody, and control of the child to the mother.

Judgment affirmed and cause remanded.

CITY SAVINGS & TRUST COMPANY v. SELINA A. PECK AND
HAMILTON S. PECK.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 8, 1918.

*Negotiable Instruments—Assignment—Payment—Bona Fide
Holder—Partial Failure of Consideration.*

A mortgagee of real estate assigned the mortgage and note, but no notice of the transfer was given to the mortgagors, who made payments on the note to the mortgagee, believing him to be the owner thereof. The assignee looked to the mortgagee and to an indorser on the note for payment, and expected the mortgagee to collect the note from the mortgagors. *Held*, the payments made by the mortgagors should in equity be treated as made to the mortgagee as agent of the assignee, to be applied upon the note.

The indorsee of a promissory note, negotiated while current, who has paid therefor a sum equal to the face value thereof, less the discount, is, under the Negotiable Instruments Law (No. 99, Acts 1912, sec. 59), *prima facie* deemed to be a holder in due course, and is presumed to be a *bona fide* holder, the contrary not appearing.

A partial failure of consideration of a promissory note, between the original parties thereto, is not available *pro tanto* in defence against a subsequent holder for value and before maturity.

APPEAL IN CHANCERY. Petition for foreclosure of a real estate mortgage. Heard on bill, cross bill, answers, oral evidence and facts found by the chancellor at the September Term, 1917, Chittenden County, *Butler*, Chancellor. Decree, that there was due and unpaid on the note described in the bill of complaint, the sum of \$675.40; that plaintiff was the lawful holder thereof, that the same was secured by the mortgage of defendants, of which plaintiff was the equitable assignee and holder, and that plaintiff was entitled to foreclose the mortgage; that unless the defendants should pay or cause to be paid the sum due on or before one year from June 12, 1917, with costs and interest, they and all persons claiming under them, should be foreclosed of any equity in the

premises, and dismissing defendants' cross bill. Both parties appealed. The opinion states the case.

Guy W. Hill for plaintiff.

Rufus E. Brown for defendants.

WATSON, C. J. The plaintiff seeks to foreclose a mortgage on certain real estate owned by defendant Selina A. Peck, the wife of defendant Hamilton S. Peck, given by defendants to secure a note dated November 20, 1911, signed by them, for the sum of \$1,500, payable to the order of Daniel W. Aiken, one year after date, with interest.

It is found that the note was indorsed on the back by the payee and Adolph Rose & Company, and transferred to the plaintiff on July 17, 1912. At that time Aiken was indebted to Adolph Rose & Company for something like \$2,200. This company was doing business at Vicksburg, Mississippi, and was a customer of the plaintiff bank, of which Adolph Rose was president. On the day last named, the plaintiff drew its check on the First National Bank of Vicksburg for \$1,468.50, and delivered it to Adolph Rose, who in due course received the cash thereon. This was the face value of the mortgage note at the time, less the discount of \$31.50. The note was thereupon indorsed as before stated and turned over to the plaintiff at its office in Vicksburg, and there remained with the plaintiff until December, 1916. It does not appear that the plaintiff at the time had any notice of a defence to the note or mortgage. Interest on the note was paid by Aiken to January 6, 1917. No interest appears to have been indorsed on the note or paid by defendants to the plaintiff. But the defendants had no knowledge, or notice, until January 16, 1917, that the plaintiff held the note. On the contrary, they had reason to believe, did believe and supposed until then, that the note and mortgage were still the property of Aiken and held by him.

On December 2, 1911, Aiken advanced to defendants \$1,000 on the note. No further advancement was made by him, and as between him and defendants the consideration to the extent of \$500 failed. Defendant Hamilton S. Peck, for himself and wife, paid to Aiken, from time to time, to apply on this note, the net amount of \$1,210.75. These payments were made by defendants without knowledge that Aiken had transferred or disposed of the

note, and under the belief, rightly relying upon the supposed fact, that he was the lawful owner and holder thereof.

We think the chancellor was warranted in finding, as fairly inferable from the facts stated, that the plaintiff, at the time it took the note and thereafter, looked to and relied upon its president, Adolph Rose & Company, and Aiken to pay or see that the note was paid, and expected Aiken to collect the note and interest of defendants, and that plaintiff knew, or was put upon inquiry and ought to have known, that Aiken was dealing with and collecting money upon the note from defendants.

If the plaintiff expected Aiken to collect the note and interest of defendants, it must have expected him to do so as its agent, for he had no right to do it otherwise. There is no other reasonable conclusion to be drawn, especially in view of the further fact that plaintiff knew, or ought to have known, that Aiken was dealing with defendants and collecting money of them on the note, and, so far as the case shows, made no objection thereto. In these circumstances, we think the payments made by defendants to Aiken should in equity be treated as made to him as plaintiff's agent, to be applied on the note, and that they were properly used by the chancellor in reduction of the sum due in equity.

On the claim to recover the full amount of the note, notwithstanding part of it was without consideration, it is argued by defendants that the plaintiff does not stand as a *bona fide* holder for value. But the record does not bear out this position. It appears that the note was negotiated to the plaintiff while current, and at a time when Aiken was indebted to Adolph Rose & Company in a sum much larger than the amount of the note; that the plaintiff then drew its check on another bank for a sum equal to the face value of the note less the discount stated above, and delivered the same to Adolph Rose who received the cash thereon in due course; that the note was thereupon indorsed as before stated and turned over to the plaintiff, and has hitherto been held by it. By statute the plaintiff is deemed *prima facie* to be a holder in due course (Laws of 1912, No. 99, § 59), and the presumption is that it is a *bona fide* holder, as the contrary does not appear. *Blaney v. Pelton*, 60 Vt. 275, 13 Atl. 564; *Limerick Nat. Bank v. Adams*, 70 Vt. 132, 40 Atl. 166.

Nor in the circumstances of this case is the fact of partial want of consideration for the note, between the original parties thereto, available in defence *pro tanto* against the plaintiff, as

transferee. *Farrar v. Freeman*, 44 Vt. 63; *Thrall v. Horton*, 44 Vt. 386; *Hoyt v. McNally*, 66 Vt. 38, 28 Atl. 417.

Decree affirmed and cause remanded. Let a new time of redemption be fixed.

GILBERT W. BRADLEY v. AMOS N. BLANDIN AND SOMERSET LAND COMPANY.

Special Term at Brattleboro, February, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 8, 1918.

Practice Act—Answer—Inconsistent Defences—Motion to Strike Out.

An answer under the Practice Act should state all grounds of defence relied upon, not inconsistent with each other; and may properly be divided into separate paragraphs, although this is not essential. Defences are inconsistent only when they cannot both be true, and the proof of one necessarily proves the falsity of the other.

If an answer, filed under the Practice Act, sets forth inconsistent defences, the better practice is to take advantage thereof by a motion to strike out.

An answer denying a contract alleged in the complaint may properly state facts explanatory of the denial, thus making the denial more fairly to meet the substance of the allegations denied, and is not open to the objection that it amounts to the general issue.

A demurrer to a part of an answer cannot be sustained unless the part demurred to, as a whole, shows no defence.

CONTRACT. Heard on plaintiff's demurrer to the second count of defendants' answer, at the December Term, 1917, Bennington County, *Waterman, J.*, presiding. Demurrer overruled, and count adjudged sufficient. Plaintiff excepted.

The complaint alleged an agreement by defendants to pay plaintiff a commission for effecting the sale of certain land; that

plaintiff had performed his part of the agreement, but that defendants refused to pay him the commission.

The second count of the answer was as follows:

"And for further answer in this behalf the defendants say that on or about the 25th day of May, 1910, the Somerset Land Company promised to pay the plaintiff a two and one-half per cent. commission if certain lands were sold to Finch-Pruyn & Co. of Glens Falls, N. Y., for the sum of one million dollars, that neither said lands nor timber thereon, nor any part thereof were then or ever sold to said Finch-Pruyn & Co., that no other or different contract existed between said plaintiff and said defendants or either of them, that thereafter on or about the 29th day of November, 1911, and on or about the 19th day of December, 1911, and on or about the 22d day of December, 1911, the said defendants acting in good faith notified the plaintiff in writing that the said lands including the lands mentioned in the said plaintiff's declaration and the timber thereon were not for sale, that the same were not to be offered for sale either by said Bradley, or by anyone else or by anyone acting for, with or through said Bradley; that said defendants thereby then and there acting in good faith wholly terminated and revoked any and all promises, agency, agreements, employment or authority, if any such there were then or theretofore given to or made with said plaintiff by said defendants or either of them, that prior thereto neither the said Bradley nor anyone acting for him or through him or because of him had made any sale of said land or the timber thereon, or found any customer or purchaser who would or did purchase said land or said timber thereon, and this the defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action against the defendants."

To this count plaintiff demurred, among other grounds not insisted upon, for that it amounted to the general issue.

Batchelder & Bates and Frank C. Archibald for plaintiff.

Harvey & Whitney, Robert E. Healey and Hale K. Darling for defendants.

WATSON, C. J. This is an action of assumpsit on contract. The case (which has been here twice before, and is reported in

89 Vt. 542, 95 Atl. 894, and in 91 Vt. 472, 100 Atl. 920) is here on plaintiff's demurrer to the so-called "second plea" of defendants' answer—more properly speaking, it is the second paragraph of the answer.

Though the action was pending at the time of the passage of the Practice Act, the law of that act applies. Laws of 1915, No. 90, Sec. 18.

By section 2, pleadings in defence shall consist of "(b) An answer, which shall contain either a denial of the allegations of the complaint or some of them; or a brief and simple statement of the facts relied upon in defence." By subdivision (c), a demurrer may be filed, which shall distinctly specify the reason why the pleading demurred to is insufficient. By section 3, no pleading shall fail for want of form, but shall be amended in such respects at any stage of the proceeding, if the fault be pointed out; and the sufficiency of all pleadings in this respect shall be for the discretionary determination of the trial court. Subdivision (d) provides for such further pleadings as may be required, etc.; but this has reference to pleadings subsequent to the answer.

It is very apparent that, in contemplation of the act, the answer shall, in the manner stated, contain all the defences relied upon. This is in accordance with the general rule governing pleadings under reform-procedure acts, where, as here, the primary object of the Practice Act is to simplify and improve practice and procedure, in civil actions. The answer, as in equity pleadings, should be drawn in a way stating all grounds of defence upon which the defendant relies. In doing this, the answer may properly be divided into separate paragraphs, thus distinguishing the different grounds, but this is not essential; for all may be stated in one paragraph. *Greenthal v. Lincoln*, 67 Conn. 372, 35 Atl. 266; *Freeman's Appeal*, 71 Conn. 708, 43 Atl. 185. A limitation of the rule is, that the answer cannot contain inconsistent defences. But defences are inconsistent only when they cannot both be true, and the proof of one necessarily proves the falsity of the other. *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438; *Susznik v. Alger Logging Co.*, 76 Oregon 189, 147 Pac. 922, Ann. Cas. 1917 C, 700. If the answer sets forth inconsistent defences, advantage thereof should be taken by motion to strike out, or perhaps by moving that the defendant be directed to elect upon which of the inconsistent defences he will rely.

Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 757; *Strouse v. Leipf*, 101 Ala. 433, 14 So. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122; *Hart-Parr Co. v. Keeth*, 62 Wash. 464, 114 Pac. 169, Ann. Cas. 1912 D, 243. The former should seem to be the better practice, since thereby the plaintiff may be informed of the particular grounds of defence in season to prepare his case for trial accordingly.

The paragraph of the answer demurred to sets forth, as one ground of defence, that on or about the day named the Somerset Land Company promised to pay the plaintiff a two and one-half per cent. commission if certain lands were sold to Finch-Pruyn & Company of Glen Falls, N. Y., for the sum of \$1,000,000, that neither said lands nor the timber growing thereon, nor any part thereof, was then or ever sold to said Finch-Pruyn & Company, that no other or different contract existed between said plaintiff and said defendants or either of them. It is said that this part of the answer amounts to the general issue. We think it does, because it is equivalent to a denial of the making of the contract alleged in the complaint; and in making such denial it was proper for the defendants to state the facts as explanatory of their denials, thus making the denial more fairly to meet the substance of the allegations denied. Thereby the plaintiff was more fully apprised of the real issue raised by the denial. The demurrer was properly overruled. *Wilmot v. McPadden*, 78 Conn. 276, 61 Atl. 1069; *British American Ins. Co. v. Wilson*, 77 Conn. 559, 60 Atl. 293. A demurrer to part of the answer (as in this case) cannot be sustained unless the part demurred to, as a whole, shows no defence.

Whether by the revision of 1917, of the statutes, the Practice Act was materially altered in any of its provisions discussed above, is not considered.

Judgment affirmed and cause remanded.

PATRICK F. HOWLEY v. GEORGE T. CHAFFEE AND JOHN BURTON.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 8, 1918.

*Chancery—Injunction Damages—Appeal—Findings of Fact—
Intendments in Support of Decree.*

In an appeal from a decree determining injunction damages, after the dissolution of an injunction restraining defendant from moving a barn, an exception to the master's report on the ground that defendant's damages were caused by the action of the municipal authorities in revoking his permit to move the barn, and not by the injunction, will not be sustained where the fact of such revocation is not found, and, if it should be considered as appearing of record, four days elapsed after the issuance of the injunction before the revocation, because, by intendment in support of the decree, it will be considered that this was ample time in which to move the barn as contemplated.

APPEAL IN CHANCERY. Heard on the report of a special master determining the damages occasioned to defendants by the injunction previously obtained against them by plaintiff, and plaintiff's exceptions thereto, in vacation after the March Term, 1917, Rutland County, *Slack*, Chancellor. Decree for defendants for the sum found by the master. Plaintiff appealed. The opinion states the case. See prior report of this case, 88 Vt. 468, 93 Atl. 120.

Charles L. Howe for plaintiff.

F. S. Platt and *W. B. C. Stickney* for defendants.

WATSON, C. J. This case (reported in 88 Vt. 468, 93 Atl. 120) is now here on the plaintiff's appeal from the decree rendered on the question of injunction damages.

Defendant Chaffee is the owner of certain land situated in the city of Rutland, known as the "Richardson" property, on

which there was a barn 60 feet long and 35½ feet wide. In the spring of 1913, he contemplated erecting a building hereinafter called the "Playhouse," upon the westerly portion of said premises; and to this end it became necessary to move the barn mentioned. He applied for and received permits or licenses from the city authorities, both to erect such building and to remove the barn. On July 3, 1913, defendant Burton, acting under a contract with Chaffee, had placed the barn on rollers and had moved the same off the Playhouse site to and onto the open lot lying east of that site, when the plaintiff procured an injunction against Chaffee and Burton, restraining them from moving the barn further toward the site contemplated for it. At that time, Chaffee had not determined exactly where he would locate the barn, but had made a contract with Burton to move it for a specified sum to such point along the northerly line of the premises mentioned (as the open lot lying east of the Playhouse site) as he, Chaffee, might finally determine and elect to place it.

The plaintiff excepted to the master's report: "Second.—Because the defendant, by reason of the ordinances of the city, having no right to move the buildings, his damages, if any such there were, were not the result of or occasioned by the injunction, and he cannot recover."

It is argued in support of this exception that the permit to move the barn was revoked by the city authorities on July 7, 1913. But a careful reading of the master's report shows that such revocation is not found. Besides if it be considered as appearing of record, four days elapsed after the injunction was issued before the time of the revocation. For aught we know, this was ample time in which to complete the job of moving the barn as contemplated, had the work not been stopped by the injunction, and by intendment in favor of the decree, it will be so considered.

Decree affirmed and cause remanded.

CHARLES BIANCHI & SONS v. MONTPELIER & WELLS RIVER
RAILROAD.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, and TAYLOR, JJ.

Opinion filed May 8, 1918.

Carriers—Bill of Lading—Reasonable Provisions—When Responsibility as Carrier Ceases—Arrival of Shipment—Notice to Consignees—Liability of a Warehouseman—Burden of Proof—Exceptions—When not Considered.

A provision in a bill of lading issued by a railroad company to the effect that property received from or delivered on private or other sidings, wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from the trains, is reasonable in the eye of the law and not inconsistent with public policy.

By accepting a bill of lading, a shipper is presumed to assent to, and agree to be bound by, such provisions therein as are reasonable in the eye of the law and not inconsistent with public policy.

When a car containing a shipment is delivered by a railroad company on a private siding, designated in the bill of lading, and the consignees given a reasonable opportunity to examine the shipment and take it away, the responsibility of the carrier, as such, ceases.

A terminal carrier has a right to act upon the basis that the consignees still hold the bill of lading and are the owners of the property described therein, until it is notified to the contrary.

A carrier is not bound to give notice to the consignees of the arrival of a shipment at the place of destination in order to relieve it, as such, from liability.

In the relation of warehouseman a carrier is bound only to use ordinary care and diligence in keeping the goods safely.

In an action against a carrier the burden of proof upon the question whether it has failed to use ordinary care and diligence in its relation as warehouseman is upon the plaintiff.

A terminal carrier may properly, in the performance of its duties as warehouseman, allow a granite monument to remain in the car, on a private siding designated in the bill of lading as the place of delivery, instead of putting it in a store-house.

Exceptions raising questions of damages will not be considered where liability on the part of defendant is not established.

TROVER, for the alleged misdelivery of a granite monument, shipped by plaintiffs over the defendant railroad, and consigned to themselves at St. Louis, Missouri. Plea, the general issue. Trial by court at the March Term, 1917, Washington County, Miles, J., presiding.

STATEMENT BY WATSON, C. J. It is found that on the 3d day of September, 1915, the plaintiffs delivered to the defendant, at Barre, this State, the monument in question, manufactured by them for the Norman Monument Company of St. Louis, Missouri, and received of the defendant a bill of lading which is made a part of the findings. The monument consisted of four pieces, each of which was boxed and marked "Chas. Bianchi & Sons, (the plaintiffs,) St. Louis, Mo." The bill of lading reads: "Consigned to C. Bianchi & Sons. Destination St. Louis, Mo. L. H. Tieman Switch on Mo. Pac." The bill of lading had printed across its face the words, "not negotiable."

The terminal carrier, the Missouri Pacific Railroad, at the point of destination, without the production of the bill of lading, delivered the car containing the monument, onto the Tieman switch mentioned in the bill of lading. The monument was unloaded from the car by Tieman and held on wagons for twenty days, when it was delivered by him to the Norman Monument Company at Mount Sinai Cemetery, and was afterwards set up there in a family lot.

The L. H. Tieman mentioned lived at St. Louis, and had had the switch in question built by the Missouri Pacific Railroad for his convenience, it being understood that he should be responsible for the freight charges on all shipments placed on that switch. The switch or siding named abutted on Tieman's land, and no one except Tieman and the railroad company could have goods placed thereon without the former's consent.

The plaintiffs lived in Barre, this State, and had no expectation of receiving the monument personally, at St. Louis. They had previously shipped monumental work to the Tieman switch. No notice was ever given to Tieman of the arrival of the car containing the monument in question, upon the switch, except that he found it there on the tracks of the switch. He unloaded the car because Mr. Norman of the Norman Monument Company had told him that he was expecting it; but Norman had not told Tieman who the shipper was.

The bill of lading was never assigned to any one by the plaintiff, and was always in their possession until it was delivered in court at the time of the trial of this case. The plaintiffs never gave any order for the delivery of the monument to any one; nor have they ever paid the freight for its transportation, though it was paid to the delivering railroad by some one, but by whom it did not appear.

The plaintiffs have never received pay for the monument; nor have they ever received the monument from the terminal railroad, unless the delivery onto the Tieman switch, was in law a delivery to them as consignees.

It is stated in the finding of facts that there was no evidence of any loss, misdelivery or conversion of the monument by any of the carriers unless the facts recited constitute such; and that there was no evidence of any neglect or shortage of duty on the part of the defendant unless the facts recited constitute such.

The judgment below was for the defendant, and the plaintiffs excepted.

Richard A. Hoar for plaintiffs.

H. C. Shurtleff for defendant.

WATSON, C. J. The bill of lading stipulated the Tieman switch as the place of delivery. The contract was controlling in this respect, and the monument was delivered by the terminal carrier at that place, accordingly.

The facts found show that the Tieman switch is a private siding built for the convenience of Tieman who, by reason thereof, became responsible for freight charges on all shipments placed thereon. The fact that the railroad may put goods on that siding, did not make it other than private in this instance where the place of delivery was fixed by contract, with the making of which the terminal carrier had nothing to do.

The bill of lading contains a provision as follows: "Property * * * when received from or delivered on private or other sidings, wharves, or landings shall be at the owner's risk until the cars are attached to and after they are detached from trains." This provision is reasonable in the eye of the law, and not inconsistent with public policy; and the law presumes that the plaintiffs assented thereto and agreed to be bound by it. *Davis v.*

Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; *Leavens v. American Express Co.*, 86 Vt. 342, 85 Atl. 557, Ann. Cas. 1915 C, 1188.

When the car containing the monument was delivered on the Tieman switch specified, and was detached from the train, and the consignees were given a reasonable opportunity to inspect the monument and take it away, the responsibility of the carrier, as such, ceased. *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621; *Michigan Southern, etc., R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 278; *Schumacher v. Chicago, etc., R. Co.*, 207 Ill. 199, 69 N. E. 825; *Kingman, St. Louis Impl. Co. v. Southern R. Co.*, 133 Mo. App. 317, 112 S. W. 721; *Gulf Compress Co. v. Alabama Great Southern R. Co.*, 100 Miss. 582, 56 So. 666; 10 C. J. 233; 4 R. C. L. 833. It is urged, however, that the placing of the car upon the side track, as per bill of lading, without notice of its arrival being given to the consignees, and the bill of lading surrendered, was not such a delivery as will relieve the carrier from liability. But this position is unsound so far as surrendering the bill of lading is concerned, for that was not negotiable, and the property was delivered at the place stipulated therein. The terminal carrier had a right to act upon the basis that the consignees still held the bill of lading and were the owners of the property, until it was notified to the contrary. *National Bank v. Baltimore & Ohio R. Co.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321. By the law of this State, the carrier was not bound to give notice to the consignees of the arrival of the property at the place of destination, in order to relieve it, as such, from liability. *Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 349. On the facts of record, there is no ground upon which the defendant can be held liable in its capacity as a common carrier.

The question then is whether the defendant is liable in its relation of a warehouseman. Assuming that the provisions quoted above from the bill of lading do not relieve the carrier from its common law duty in this respect, have the plaintiffs made out a case?

In this relation the carrier is bound only to use ordinary care and diligence in keeping the goods safely. *Blumenthal v. Brainard*, cited above. And the burden of proof is with the plaintiffs. The record states that there was no evidence of any neglect or shortage of duty on the part of the defendant unless

the facts recited constitute such. The nature of the goods was such that in the performance of its duties as warehouseman, the terminal carrier might very properly let the goods remain in the car on the siding (where it was required to be placed by the bill of lading), instead of putting them in a storehouse. *Schumacher v. Chicago, etc., R. Co.*, cited above. The carrier delivered the monument to no one other than the plaintiffs, nor did it authorize its removal from the car or from the siding by any one except the plaintiffs. The facts recited do not, as matter of law, constitute neglect or shortage of duty by it, and there was no error in the judgment.

Since liability on the part of the defendant is not established, the questions argued touching the amount of damages are immaterial.

Judgment affirmed.

JOHN S. HEFFLON v. JAMES E. CASHMAN.

November Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 8, 1918.

*Trial — Evidence — Error — Witnesses—Competency—Opinion
Evidence—Value—Preliminary Question for Trial Court.*

Where a party does not move to have evidence stricken from the record, but merely objects to its reception unless something further appears, and, after a subsequent question and answer suggested by his objection, it is stricken out by the court of its own motion, no reversible error appears.

The law does not attempt to define the amount of knowledge a person must possess to make him a competent witness as to value, except that he must have sufficient acquaintance with the subject matter to enable him to form some estimate of its value.

Whether a witness has sufficient acquaintance with the subject matter to make him competent to testify as to value is a preliminary question for the trial court, and its ruling thereon will not be revised unless shown to be erroneous or founded on an error of law.

Upon the question of the value of property, any person who knows it and has an opinion of its value may give that opinion in evidence for whatever the jury may deem it worth.

Where the question was as to the value of the use of a building for storage purposes, *held*, there was sufficient evidence by way of foundation to make the competency of the witnesses to testify on this subject a question for the trial court.

ASSUMPSIT. Plea, the general issue. Trial by jury at the March Term, 1917, Chittenden County, *Butler, J.*, presiding. Verdict for plaintiff. Defendant excepted. The opinion states the case.

Theodore E. Hopkins for defendant.

M. G. Leary and *J. J. Enright* for plaintiff.

TAYLOR, J. The plaintiff seeks to recover the rent of a certain building on a lot adjoining a spur track of the Rutland Railroad Company in the city of Burlington for twenty months during the years 1911 and 1912. The building was occupied by the defendant or his lessee, the Texas Oil Company, for the storage of gasoline. The only disputed question was as to the amount to be paid as rent, the defendant claiming an express contract for a rental of three dollars per month and the plaintiff claiming that the rent was not fixed in the contract and that he was entitled to recover what the premises were reasonably worth for storage purposes. The trial was by jury with verdict in accordance with the plaintiff's claim.

The defendant briefs three exceptions taken during the trial. The evidence tended to show that the defendant sublet the storehouse to the Texas Oil Company in February, 1912. The plaintiff called the defendant as a witness and, "for the purpose of testing his opinion" of the fair rental value of the building, asked him what he received a month from the Texas Company for the use of the storehouse. Defendant's counsel interposed an objection that the evidence was immaterial; but the defendant answered "fifteen dollars," without waiting for the court's ruling. To the question, "Was that a reasonable rental for it?" defendant's counsel objected that it did not appear "whether that was for additions and improvements to the building and be-

cause the price he got is not controlling on the rental value of the building," adding, "For these reasons we object as to the amount he received until it appears whether it was the same thing he rented from Hefflon." The court directed that the answer stand subject to the defendant's exception. The very next question brought out the fact that the defendant had made changes and repairs before subletting the premises, and thereupon the court, of its own motion, ordered the answer as to rent stricken out and directed the jury to disregard it. Nothing appears to justify a reversal on account of this incident. The answer, if objectionable, got upon the record through the defendant's own fault. His counsel did not ask to have it stricken out, but objected to it unless something further appeared. Plaintiff's counsel promptly pursued the inquiry suggested in the objection, with the result that the defendant got all that, in the circumstances, he could have asked for. The cases cited by the defendant to the effect that error in the admission of evidence is not cured by directing the jury to disregard it are not in point. As the answer went out, we have no occasion to consider its admissibility.

The remaining exceptions challenge the admissibility of the opinions of certain witnesses as to the rental value of the premises and present substantially the same question. The objection was that a sufficient basis for the expression of the opinion had not been shown. A similar question was before the court in *Brown v. Aitkin*, 90 Vt. 569, 99 Atl. 265, where the cases are collected and the rule applicable to this case is restated. It is enough to say that the law does not attempt to define the amount of knowledge a person must possess to make him a competent witness of value, except that he must have sufficient acquaintance with the subject matter to enable him to form some estimate of its value. Whether he meets this requirement is a preliminary question for the trial court and we do not revise its ruling thereon unless it is shown to be erroneous or founded on an error of law. For example, where the question is the value of property, any person who knows it and has an opinion of its value may give that opinion in evidence for whatever the jury may deem it worth. Here the opinions admitted were as to the value of the use of the building for certain purposes, which involved, not so much its value as a structure, as the convenience of its location and its adaptability to that use. One of the witnesses had resided in Burlington for many years and had been in the trucking business

for about three years, drawing goods from the Rutland Railroad to different parts of the city and the surrounding country. He had had occasion to rent storehouses and knew the expense of unloading from a car to a storehouse. He knew the location of plaintiff's storehouse but never had been inside the building—couldn't say how good it was. He knew it was suitable and well located for storing drums of gasoline—the use to which it was put. The other witness was a long-time resident of Burlington engaged in the wood and coal business. He knew the location of the storehouse and had been in the building. Said he had an opinion of its rental value, though he had never rented a storehouse along the lake front. There was some evidence by way of foundation in the case of each, enough to make their competency to testify as to value a question for the trial court. The exceptions cannot be sustained.

Judgment affirmed.

JAMES F. McBRIDE v. HIEL C. McNALL, GUARDIAN, AND
NETTIE KIBBE.

October Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 8, 1918.

*Trial—Referee's Report—Sufficiency—Commitment—Lease on
Shares—Settlement Between Parties.*

It is not essential to the sufficiency of a referee's report that he state therein that all the facts appearing in evidence have been detailed, nor is it essential that he catalogue the evidence and dispose of it categorically.

The trial court may, on proper showing, recommit a referee's report to supply facts material to the issues which he has failed to find and report; but is justified in presuming regularity until the contrary is made to appear.

Under a lease of a farm on shares which provided that the lessee should leave the same amount of hay and fodder on the farm at the end of the term as was thereon at the date of the lease, the lessee was properly charged with all the shortage in this respect, in a settle-

ment between the parties, upon the termination of the lease by agreement before the term thereof had expired.

CONTRACT. Plea, the general issue. Heard on the report of a referee and plaintiff's exceptions thereto, and upon plaintiff's motion to recommit the report, in vacation after the January Term, 1917, Grand Isle County, *Slack, J.*, presiding. Judgment overruling plaintiff's exceptions, and his motion to recommit, and for plaintiff to recover damages of \$5.60 and costs. Plaintiff excepted. The opinion states the case.

Clarence P. Cowles for plaintiff.

A. G. Whittemore and *John H. Mimms* for defendants.

TAYLOR, J. This action is brought to recover a balance claimed to be due from the defendants on an account growing out of a farm lease. The case was heard on a referee's report and plaintiff's exceptions thereto. The exceptions were overruled and judgment rendered on the report for the plaintiff to recover \$5.60 damages and his costs. The plaintiff brings the case here on exceptions to the judgment and to the action of the court in overruling his exceptions to the report.

The only point made by the plaintiff on the exceptions to the report is that the referee should have reported, and expressly stated that he reported, all the facts pertinent to each issue and all those from which he drew his conclusions. The record fails to disclose error, in this regard. It does not show what, if any, pertinent facts appearing in evidence the referee omitted to report. It is not essential to the sufficiency of a referee's report that he state therein that all the facts appearing in evidence have been detailed, nor is it essential that he catalogue the evidence and dispose of it categorically. The court, on proper showing, could have recommitted the report to supply facts material to the issues which the referee failed to find and report; but would be justified in presuming regularity until the contrary was made to appear. *Martin v. Wells*, 43 Vt. 428.

Under the exception to the judgment plaintiff claims that he is entitled to recover an additional sum on account of an error in settlement. The question depends upon the construction of the contract, which was wholly in writing. The defendant McNall, as guardian, leased to the plaintiff a certain farm with the stock and tools and a specified quantity of grain thereon, for the term

of three years from April 1, 1913, to be carried on as a dairy farm. The plaintiff covenanted that he would occupy the premises in a husband-like manner and pay the defendant a yearly rent of one half of all products of the farm including hay and grain. He was to pay one half of the taxes assessed on the property during the term, furnish one half of the seed grain, potatoes or other crops, and perform the labor on the farm without charge to the defendant. The stock was to be kept good as to number and quality and returned at the end of the term with the same amount of grain as that received. Included in the property turned over to the plaintiff under the lease was some hay and other fodder. The lease provided that: The stock on the farm was "to be fed to hay until grass at the end of the term or hay and fodder left sufficient for them, the same amount of hay, fodder and other products to be left or provided by the grantee (the plaintiff) as he receives at this time."

About April 1, 1915, by reason of impaired health, plaintiff notified the defendant that he wanted to surrender the premises and requested him to come and settle their affairs. Near the middle of April the plaintiff and defendant met and after some negotiation agreed to settle according to the terms of the lease. They selected two appraisers, who, it was agreed, should adjust among other things a shortage of hay and ensilage. The appraisers met the parties and determined the shortage to their mutual satisfaction. Thereupon the plaintiff and defendant set about settling their accounts. The defendant did the "casting of the account" and charged the plaintiff with the whole of the shortage. A small balance was found due the plaintiff which the defendant paid and the plaintiff accepted without objection. There were some matters of difference which the parties compromised to effect a settlement, though it does not appear that there was any disagreement concerning the amount to be charged on account of the shortage of fodder. Later the plaintiff claimed an error in the settlement and that he should have been charged only one half of the shortage. Such is the claim now urged.

Regardless of whether the settlement amounted in law to an accord and satisfaction, a question not decided, the claim cannot be sustained. The shortage charged and allowed in settlement was no more than the plaintiff had agreed to provide for at the end of the term. He was bound by the contract to have on the farm the same amount of hay, fodder and other products that he found when he took it. Instead of providing the hay and

ensilage to make good the shortage he elected to pay presumably what it would have cost to replace it. The contract did not require the defendant to make up any part of the shortage.

The case differs from *Warren v. Caryl*, 61 Vt. 331, 17 Atl. 741, relied upon by the plaintiff. There the lease was for a term of two years from April first, and the plaintiff, who was the lessor, sued for one half of a quantity of hay "used and not returned." The contract was specific with reference to the stock on the farm, its increase and income therefrom, and the use and production of the farm during the term, but contained no reference to the hay to keep the stock out the first spring. The lease gave the defendant one half of the hay on hand at the close of the term, binding him only to feed it out on the farm. By an independent contract the parties subsequently agreed to have the amount of hay that the plaintiff there had on the farm and the amount on hand when the lease terminated determined by appraisers, and to adjust the item of hay by their determination. It was held that the defendant thus agreed, in effect, to purchase one half of the hay on hand when he took the farm and the plaintiff to receive in payment therefore the half of the hay on hand at the end of the term belonging to the defendant; and that there arose from this arrangement an implied agreement by each to pay the other whatever balance there might be found due at the end of the term. Having regard for the terms of this contract, it was said that it would be the duty of each party to furnish one half of the hay required to keep the stock out the first spring.

The only other case cited by the plaintiff to this proposition is *Smalley v. Corliss*, 37 Vt. 486, which on examination it will be seen is an authority against him. There under a provision in a farm lease on shares that the lessor was to have one half of the gross proceeds of the farm and "as much property and value in hay, seed, teams, tools and stock" returned to him at the end of the term as he delivered to the lessee, it was held that the lessee had bound himself to return the property he received, or its equivalent in value, even though the loss or depreciation was wholly without his fault. Like that in *Smalley v. Corliss*, the language of the contract under consideration is clear and unequivocal and does not admit of the construction that the plaintiff claims. The court did not err in rejecting this item of the plaintiff's specification.

Judgment affirmed.

JOSEPH L. WELLS v. ROY L. BLODGETT.

January Term, 1918.

Present: WATSON, C. J., HASLTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 8, 1918.

Chattel Mortgages—Description of Property Mortgaged—Sufficiency—Trover—Trial—Requests for Instructions.

A statement of the location of the mortgaged property is not indispensable to a sufficient description in a chattel mortgage, although it will always aid in indentifying the property and may often render a mortgage, otherwise indefinite and uncertain, sufficiently certain by making the mortgage itself indicate where the property may be found on inquiry.

In testing the sufficiency of a description in a chattel mortgage covering "one red and white cow, four years old," it will not be assumed that the mortgagor had more than one cow of this kind; this fact being a matter of defence in impeachment of the mortgage.

A request for a binding instruction that a description in a chattel mortgage is insufficient cannot be complied with unless this can be said as a matter of law.

It is the well settled general rule that the description of animals in a chattel mortgage by sex, age, and color is sufficient to give the description *prima facie* validity; but this rule is subordinate to the rule that, as a general proposition, to be sufficient against third persons having constructive notice only, the description in a chattel mortgage must be such that the property can be identified by reference to the instrument itself, aided by such inquiries as may be indicated or directed thereby.

In passing upon a request for a binding instruction that the description of a cow in a chattel mortgage was insufficient, it will be assumed that the cow in question was truly described.

A description in a chattel mortgage, of a red and white cow, four years old, included among twelve cows mortgaged, *held*, under the circumstances, *prima facie* sufficient to charge a purchaser of the cow from the mortgagor with notice of the mortgage, it being presumed in aid of the description that the mortgagor was then the owner of the cows.

In an action of trover for a cow, brought by a mortgagee against a purchaser from the mortgagor, wherein the plaintiff relied upon three mortgages, two of which were executed at a time when there was evidence that the mortgagor had parted with the property, a refusal to instruct the jury that plaintiff could not recover by virtue of any mortgage executed by the mortgagor to him after the defendant had purchased and taken possession of the cow, was error.

A request to charge which presents an abstract question of law not applicable to the facts in issue is properly refused.

In an action of trover, brought by a mortgagee against a purchaser from the mortgagor, for a cow described in the mortgage as a red and white cow four years old, included among twelve cows mortgaged, it was, under the circumstances, error to submit the case to the jury on the theory that the determining issue was the identity of the cow, but the court should have charged that whether or not the mortgage was binding against the defendant depended upon the accuracy of the description, and that if the color of the cow was as described in the mortgage, the description was sufficient as against the defendant; otherwise, not.

TROVER. Plea, the general issue. Trial by jury in the Caledonia County Municipal Court, *G. C. Frye*, Judge. Verdict for plaintiff. Defendant excepted. The opinion states the case.

Porter, Witters & Harvey for defendant.

Searles & Graves for plaintiff.

TAYLOR, J. The action is trover to recover for the alleged conversion of a certain cow on which the plaintiff claimed to hold a mortgage. The trial was by jury with verdict and judgment for the plaintiff. There was evidence tending to show that the defendant purchased the cow of one Cushman; that Cushman had previously bought the cow from the plaintiff; that he had given the plaintiff three chattel mortgages covering this cow and other personal property; that the mortgage liens were still in force; that before this suit was brought the defendant had sold the cow to one Gilman. The plaintiff produced in evidence three chattel mortgages from Cushman to himself, one executed in September, 1913, and the other two in October, 1914, on which he based his right of recovery.

The principal issues at the trial were as to the color of the cow in question and the date of her purchase by the defendant. By a special verdict the jury found that the purchase was in June, 1914. It was not claimed that the cow purchased by the defendant was not the one the plaintiff sold Cushman; but the defendant relied upon the claim that the description in the mortgage was insufficient to create a lien against a third person, among other things, in that the color of the animal was not truly stated. It did not appear whether the defendant had or did not have notice of an incumbrance other than such constructive notice as the record of the mortgages would impart; but no claim has been made that the rights of the parties are affected thereby.

The plaintiff's evidence tended to show that the cow was still in Cushman's possession when the last mortgage was executed and that she was a red and white grade Durham, four years old at the time of the original mortgage; while the defendant's evidence tended to show, as the jury has found, that she was sold and delivered to the defendant in June, 1914, before the two last mortgages were executed, and that she was not in color red and white, but a gray or Jersey color, with no distinct markings.

The chattel mortgage of September, 1913, so far as is material, described twelve cows, giving the color and age of each, including "1 red and white, 4 yrs.", and concluded, without more, "all above described cows are grade Durhams and Holsteins." The location of the mortgaged property is not given in the description. There was evidence tending to show that the cows described in this mortgage were at the time of its execution in Cushman's possession on his farm in St. Johnsbury and were the only cows then on said farm.

By certain requests the defendant asked for a binding instruction that as to the cow in question the mortgage was of no force, because of an insufficient description. It is urged, citing *Joslyn v. Moose River Lumber Co.*, 83 Vt. 50, 74 Atl. 385, 138 Am. St. Rep. 1067, 21 Ann. Cas. 1024, as a ground of insufficiency that the location of the property sought to be mortgaged is not given. It was said in the case cited that one of the most important elements in the description of mortgaged chattels is a statement of their location and the one thing which the draftsman of a mortgage should never omit. These remarks were cautionary and are of force at the present time. They were

specially significant in that case where an erroneous location of the property was suggested. However, it was not held that location of the property is indispensable to a sufficient description. It will always aid in identifying the property and may often render a mortgage, otherwise indefinite and uncertain, sufficiently certain by making the mortgage itself indicate where the property may be found on inquiry.

It is also said in support of the claimed insufficiency that it does not appear from the mortgage, but that the mortgagor at the time owned other cows answering the description. But in testing the sufficiency of the description it will not be assumed that he may have had more than one red and white cow 4 years old. That fact would be a matter of defence in impeachment of the mortgage. *Shum v. Claghorn*, 69 Vt. 45, 52, 37 Atl. 236.

The requests for a binding instruction could not be complied with unless the court could say as a matter of law that the description was insufficient. As a general proposition, to be sufficient against third persons having constructive notice only, the description in a chattel mortgage must be such that the property can be identified by reference to the instrument itself, aided by such inquiries as may be indicated or directed thereby. 5 R. C. L. 424; *Rogers v. Whitney*, 91 Vt. 79, 99 Atl. 419; *National Bank of Chelsea v. Fitts*, 67 Vt. 57, 30 Atl. 697.

It is the well settled general rule that the description of animals by sex, age and color is sufficient to give the description *prima facie* validity. *Shum v. Claghorn*, *supra*; *Rogers v. Whitney*, *supra*. However, this rule is subordinate to the rule stated above. The ultimate question is whether the description in the particular case is such as to enable a third person to identify the property by its aid, together with the aid of such inquiries as the instrument itself suggests. See *Parker v. Chase*, 62 Vt. 206, 20 Atl. 198, 22 Am. St. Rep. 99, and cases cited above.

For the purpose of a request for a binding instruction (the equivalent of a motion for a directed verdict) we must assume that the cow in question was truly described. We must also take into account the facts, disclosed in the evidence, of which the defendant must be deemed to have had notice. The record of the mortgage charged him with notice that Cushman, from whom he was about to purchase a red and white grade Durham cow, had in September, 1913, mortgaged to the plaintiff 12 cows, all grade Durhams and Holsteins, including a red

and white cow, then 4 years old. It would be presumed in aid of the description that Cushman was then the owner of the cows. *Shum v. Claghorn*, 69 Vt. 45, 50. Inquiry would have disclosed that Cushman had in his possession, when the mortgage was given, on the farm where this cow was in June, 1914, twelve cows answering the description of mortgage, and no more; and would have identified the cow he was purchasing as one of this number. With this information the defendant could not well have had any doubt that the mortgage covered this particular animal. In the circumstances the description was *prima facie* sufficient and the case was for the jury.

The court erred in refusing to comply with defendant's first request, which was that the jury be instructed that the plaintiff could not recover by virtue of any mortgage executed by Cushman to him after the defendant had purchased and taken possession of the cow in question. The plaintiff was relying upon three mortgages, two of which were executed after a time when there was evidence tending to show Cushman had parted with the property. The jury found for the defendant on this issue, and should have been told that in case they so found, the mortgages subsequently executed could not be considered as a basis of recovery.

There were other requests to charge which need not be specifically noticed. They present abstract questions of law and are not applicable to the facts in issue in this case.

The charge of the court is challenged by several exceptions. The case was submitted upon the theory that the determinative issue was the identity of the cow,—whether the cow mortgaged by Cushman to the plaintiff was the same cow that Cushman sold the defendant. As the case was tried, this was an inadequate submission of the disputed fact. The jury were told that the description by age, sex and color was *prima facie* sufficient and that the question for their consideration was the identity of the cow; while, as the case was made up, they should have been charged that whether or not the mortgage was binding against the defendant depended upon the accuracy of the description; that if the color of the cow was as described in the mortgage, the description was sufficient to give the mortgage validity as against the defendant; otherwise, not. This fault was sufficiently pointed out and requires a reversal.

The defendant moved the court to set aside the verdict and excepted to the overruling of his motion. As the defendant prevails on other exceptions, it is not necessary to consider the questions presented by this motion.

Judgment reversed and cause remanded.

WILLIAM WRIGHT v. W. C. LINDSAY.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 8, 1918.

Chattel Mortgages — Description of Property Mortgaged — Sufficiency.

A description in a chattel mortgage is sufficient as against third persons if it is such that the property can be identified by reference to the instrument, aided by such inquiries as it suggests.

The designation of an automobile in a chattel mortgage by a number on its engine, which would not ordinarily be employed for the purposes of identification, is not alone enough to nullify the notice that the mortgage would impart to third persons, for the instrument must be construed together, in view of all its parts, so that every part may be effectual.

A description in a chattel mortgage of a Ford touring automobile, of a certain model and number, purchased by the mortgagor from the mortgagee on a certain day, then in the possession of the mortgagor and being the only automobile that he then owned, is *prima facie* valid against a vendee of the mortgagor.

REFLEVIN for an automobile, brought by a mortgagee against the vendee of the mortgagor. Plea, the general issue. Trial by court at the September Term, 1917, Orleans County, *Butler*, J., presiding. Judgment, on facts found by the court, for plaintiff. Defendant excepted. The opinion states the case.

John W. Redmond for defendant.

Porter, Witters & Harvey for plaintiff.

TAYLOR, J. The action is replevin for an automobile. The plaintiff claims the property as mortgagee and the defendant as vendee of the mortgagor. The trial was by the court with judgment for the plaintiff on the facts found. The defendant excepted to the judgment on the findings, which is the only question presented for review.

On November 2, 1915, the plaintiff sold and delivered to one Baldwin the automobile in question and took a chattel mortgage to secure a note for the purchase price. The mortgage was duly recorded on November 9, 1915. The note was payable six months after date and still remains in part unpaid. The description in the mortgage is as follows: "One Ford touring automobile, Model T, Serial No. 621120, being the same automobile purchased of W. A. Wright, Nov. 2nd, 1915. One brown mare eight years old, weight about 1,000 lbs. One Babcock open buggy and one driving harness. All said property being now in the possession of said Baldwin in Newport, Vt., and being the only property of like kind now owned by said Baldwin."

The defendant purchased said automobile of said Baldwin on November 10, 1916, and took it into his possession where it was found when replevied. Demand was made of the defendant for the automobile before service of the writ of replevin, who refused to deliver it on the ground that there was no sufficient description of the automobile in the chattel mortgage and that there was no mortgage on the automobile. At the trial the defendant denied the plaintiff's right to the automobile on the ground that the description contained in the chattel mortgage does not describe the automobile in question and is not such a description as would charge him with knowledge of said mortgage. The serial number given in the description was the serial number on the engine. There were at least five different serial numbers of principal parts on this automobile. There was a plate on the dash of the car on which were the words "Mfg's number of this car is 593350." It is found that the latter number was commonly used by the manufacturers, repair shops, insurance agents and by the Secretary of State to identify the Ford car until the year 1916, when such cars began to appear

in this section without such number plate on the body; that sometimes the engine number is used for the purpose of identification and that usually the manufacturer's number is employed to identify the assembled units. The defendant did not claim that there was any universal rule as to the use of any particular number for the purpose of identification. The automobile replevied was the one sold by the plaintiff to Baldwin on November 2, 1915, and was the one intended to be mortgaged. The court found that its identity could have been easily established by inquiries suggested in the description contained in the mortgage.

In view of the findings there seems to be little room for doubt as to the validity of this mortgage against third persons, when we apply the well recognized test in such cases that the description is sufficient if such that the property can be identified by reference to the instrument, aided by such inquiries as it suggests. *Wells v. Blodgett*, ante p. 332, 101 Atl. 146, and cases there cited. The only room for doubt arises from the designation of the automobile by a number which, at the most, would not ordinarily be employed for the purposes of identification. But this alone is not enough to nullify the notice that the mortgage would impart. The instrument must be construed together in view of all its parts so that every part may be effectual. 5 R. C. L. 422. The number used actually appeared upon the car and was one sometimes employed for identification. So far as appears the defendant was not misled thereby. However, the inquiries suggested by the instrument would correct any misapprehension that the number could have created and afforded ample basis of identification, notwithstanding the confusion which may have been occasioned by the presence of other numbers.

The defendant's construction of the findings savors too much of special pleading. It is said that it is not found that the car was a "Ford Touring Automobile," nor that it was a "Model T." To be sure the expressions are not used in the findings; but the car is termed a "Ford automobile" and its identity with the car intended to be mortgaged is expressly found. The identity being established, the only question is the sufficiency of the description to give the defendant constructive notice that this particular automobile was mortgaged.

The defendant was bound to know from the record of the mortgage that a Ford touring automobile of a certain model and number, purchased by Baldwin of the plaintiff on a certain

day, then in Baldwin's possession, and being the only automobile that he then owned, was the same day mortgaged to the plaintiff. Aided by the inquiries which this description suggests, the defendant would certainly have been able, upon reasonable investigation, to ascertain that the automobile he was about to purchase of the mortgagor was the one that had been mortgaged to the plaintiff. This is all that is required to give the description *prima facie* validity. Having failed to procure findings that take away the *prima facie* effect of the description, the defendant is not in a position to question the judgment.

Judgment affirmed.

J. C. MORGAN v. VILLAGE OF STOWE.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 16, 1918.

Negligence—Municipal Corporations—Liability—Governmental Duties—Hydrants—Water Systems—Demurrer.

The liability of a municipality for negligence in the construction and maintenance of water systems, lighting plants and the like, which are for its private advantage and emolument, is that of a natural person; and it is liable for the negligence of its duly authorized agent in relation thereto, by which injury is done to another, without the fault of the latter.

A municipality is exempt from liability when injury results from the negligent performance of a governmental duty by one authorized to perform it, though the expense of the performance is borne by the municipality.

On demurrer, the facts set out in the declaration are taken to be true. Where the acts alleged to have been done by the defendant village in the construction of a fire department and location of a hydrant, could not have been done without some kind of an organized system, it will be presumed that they were done under its charter.

A hydrant connected with a water main, and installed in a village street for purposes of fire protection under authority of the village charter, is not a part of the water system of the village, constructed for its benefit or emolument, but is set apart for the exclusive benefit of the public.

It is not necessary for an act to be performed by any particular officer to give it a public or governmental character, but it is enough if the act is performed by one having legal authority so to do; and while performing it he is, by virtue thereof, a public officer.

Where, in an action against a municipality to recover for damages caused by the negligent location of a hydrant, it does not appear who located the hydrant, it will be assumed to have been located by some one having legal authority to do so.

Hydrants and apparatus for the extinguishment of fires in a municipality are in their nature public or governmental property, and their location a public or governmental act; and no action will lie against the municipality for negligence in their use and maintenance.

The action of village trustees in deliberating and adjudging upon a plan of location of hydrants for fire protection is in its nature judicial, and no action lies for errors of judgment or want of foresight therein.

TORT. Heard on demurrer to the complaint at the December Term, 1917, Lamoille County, *Stanton, J.*, presiding. *Pro forma* ruling, sustaining the demurrer and adjudging the complaint insufficient. Plaintiff excepted.

The complaint alleges that the defendant village owned and operated a system of water works for the purpose of supplying the inhabitants thereof with water for domestic purposes, and for use in the protection of the property of said inhabitants from loss and damage by fire, and that, by its servants and agents, the defendant had placed certain hydrants in its streets for use in the protection of the property of the inhabitants from loss and damage by fire; that the defendant negligently placed and installed a hydrant so close to the traveled track of the highway in one of its streets as to endanger the life and property of persons who had occasion to use the street; that while the plaintiff was driving along the street, in a careful and prudent manner, his wagon was drawn upon and against the hydrant and he was thrown out and suffered the injuries complained of.

disputed by either party; nor is there any dispute but that the law in this State is well settled, whatever it may be in other jurisdictions, that a municipality is exempt from liability when injury results from a negligent performance of a governmental duty, by one authorized to perform it, though expense of the performance is borne by the municipality. The dispute in this case arises upon the application of these rules, the plaintiff claiming that the hydrant in question is a part of the water system and not a governmental structure, and the defendant claiming that it is such a structure, exclusively constructed and maintained for a governmental purpose.

By the defendant's charter it was created a fire district, and its trustees were given the power of and made subject to the same restrictions as prudential committees in fire districts, with power to make contracts and expenditures for the preservation of property, in the defendant village, from loss or damage by fire and to provide a supply of pure water for fire, domestic and other like uses, for itself.

The plaintiff in his declaration alleges, in substance, that the defendant is the owner of the water works, and has operated the same for the purpose of supplying the inhabitants of the defendant with water for domestic purposes, and for use in the protection of the property of the inhabitants from loss and damage by fire; that in the process of construction, the defendant placed the hydrant in question in the margin of one of defendant's streets, very close to the traveled track and inside the sidewalk, and that in consequence of its being placed so close to the traveled track, it endangered the life and property of the plaintiff, and of all persons having occasion to use the street.

The declaration being demurred to, the facts stated above are taken to be true. In brief, the negligence alleged is that the hydrant was negligently placed in the street, and that that was the proximate cause of the plaintiff's injury. The defendant concedes that, if the facts stated in the declaration show that the defendant was using the hydrant for its own private advantage and emolument, the judgment below should be reversed; but it claims that the declaration shows that the hydrant was placed where it is located and was being maintained, at the time of the alleged injury, for the sole benefit of the public, and the act in placing it there was a governmental act.

For authorities sustaining its contention, the defendant relies principally upon the case of *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762. Plaintiff argues that that case is unlike the case at bar, because in that case the negligence complained of was the act of a public officer in the discharge of a governmental duty, and that the direct injury was caused by ice in the street for which municipalities have never been liable. A complete answer to that position is that the declaration does not count upon a defect in the street, and the decision of that case was not based upon that ground, and the discussion of the case in the opinion of the Court is with reference to the liability of the village on account of its negligence in repairing one of its hydrants. The negligence counted upon in this and the *Welsh* case is with reference to the hydrant, and in this respect they are alike, and the only difference is that in the *Welsh* case the negligence alleged consisted in a failure to properly *repair* the hydrant, while in this case it is for a failure to properly *locate* the hydrant. The plaintiff further claims that the *Welsh* case differs in principle from this case, because in that case the facts show that there was a duly installed and duly authorized fire protective system.

From the charter of the defendant and the allegations in the declaration in this case, it appears that the defendant has a "duly installed and duly authorized fire protective system." Its charter powers for the installation of a fire system are as broad as those in the *Welsh* case, and the declaration shows that its fire system was completely installed and organized; for the plaintiff alleges, as above set forth, facts indicating that the defendant was duly organized as a fire district.

All that is alleged to have been done by the defendant in the construction of the fire department and the installation of the hydrant in question, could not have been legally done without some kind of an organized system, and the presumption must be that it was done under its charter.

The charter of *Rutland* was more restricted, if anything, than the defendant's charter; for the defendant's charter gave to the trustees of the defendant, as stated above, all the powers of prudential committees of fire districts, and for such powers, see G. L. 4195-4201. The difference in the facts of the two cases is a difference in fact merely and not in principle. In the *Rutland* charter the supervision of the fire department was largely committed to engineers and wardens whose duties were defined

in the charter. In the case at bar the supervision of that department is given to the trustees as prudential committees in fire districts, whose duties are declared in G. L., sections above referred to.

From a careful examination of the Welsh case we think the principle involved in that case is not materially different from the principle involved in the case at bar, and if the repair of the hydrant in the Welsh case was a governmental act, the placing of the hydrant in this case was equally a governmental act, and, if that case states the law, the placing of the hydrant in question was a governmental act. Strictly speaking, the hydrant in question was not a part of the water system over which the water commissioners had charge, and for which they were empowered to fix water rates; and though the hydrant was connected with the water main, it was not a part of the water system constructed for the benefit or emolument of the defendant (*Sanborn et al. v. Enosburg Falls*, 87 Vt. 479, 89 Atl. 746); and though attached to that system it was set apart for the exclusive benefit of the public.

In the Sanborn case the facts disclosed that defendant put, on the side of one of its streets, a "barrel catch basin"; that there was a tile running under the sidewalk into this barrel and a six-inch tile from the barrel across the street, under ground, connected with the sewer of the village; that the tile was put in to protect the sidewalk and to carry surface water into the sewer; that the tile, sluice and catch basin became frozen and were neglected by the defendant in consequence of which the plaintiff's property was injured by overflowing water. The plaintiff sought to recover on the ground that the negligence was the defendant's failure to keep in repair its sewer system. The court held that the tile and catch basin were not a part of the sewer system, though connected with it, but were maintained for the protection of the street, and that the defendant was not liable for the injury.

In 19 R. C. L. 1116, § 397, it is stated, that it makes no difference that the municipality uses the same reservoirs and pipes for its fire service that it employs for the distribution of a public supply for domestic purposes, from which it derives a profit, since the two functions are clearly distinguishable. So here, the hydrant was maintained for the protection of the public from loss or damage by fire, as stated in the plaintiff's declaration.

This case, being in principle substantially like the Welsh case, deserves the same disposition as should be given to that case. If the decision in that case is sound, the judgment in this case should be affirmed.

The Welsh case has been cited as authority and with approval in *Weller v. Burlington*, 60 Vt. 28, 12 Atl. 215; *Bates et ux. v. Rutland*, 62 Vt. 178, 20 Atl. 278, 9 L. R. A. 363, 22 Am. St. Rep. 95; *School Dist. v. Bridport*, 63 Vt. 383, 20 Atl. 570; *Sanborn v. Enosburg Falls*, *supra*, and other Vermont cases, and it may now be treated as having declared the settled law of the state. The plaintiff does not directly attack its soundness, but seeks to avoid its effect by setting up a distinction between that case and the case at bar. He argues that in the Welsh case the officer, whose negligence was the alleged cause of the injury, was a public officer, because he was a first assistant engineer of the fire department, and that in this case the hydrant in question was not located by any public officer.

We fail to see the distinction claimed by the plaintiff. In the Welsh case the alleged negligent act was performed by an officer of the fire department under the direction of the village trustees, and in this case, the negligent act was performed by "the defendant by its servants and agents." We do not apprehend it is necessary for an act to be performed by any particular officer, to give to the act the character of a public or governmental act. It is enough if the act is performed by one having legal authority to perform it; and while performing the act he is by virtue of the performance of that act, a public officer.

Bates et ux. v. Rutland, *supra*, was an action for negligence in locating a stone crusher too near the highway, in consequence of which the plaintiff's horse was frightened and the plaintiff thrown out and injured. The crusher was located by direction of the village trustees outside of the limits of the village with the consent of a majority of the selectmen, and was being operated by authority of the trustees in preparing material with which to repair the village streets. It was held that the action did not lie, the Court saying: "The officers by whom the work was being performed were, for this purpose, public officers, and for their negligent act an action does not lie against the defendant."

In another place in the opinion the Court, recognizing the principle that the character of the employment is determinative of whether the act is governmental or otherwise, say: "It must

be conceded that the defendant corporation is a political subdivision of the State, chartered and organized mainly for governmental purposes. Then, were the trustees and street commissioners, at the time of the accident, engaged in a public service, or in a work that was for the peculiar benefit of the defendant in its local or special interests? The character of the employment is determinative of the defendant's liability for the acts of these officers."

In *Fisher v. City of Boston*, 104 Mass. 87, 6 Am. Rep. 196, the court say: "It makes no difference whether the Legislature itself prescribes the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit from, in its corporate capacity."

In *Hafford v. City of New Bedford*, 16 Gray (Mass.) 297, the court say: "The members of the fire department of New Bedford, when acting in discharge of their duties, are not servants or agents in the employment of the city for whose conduct the city can be held liable; but they act rather as officers of the city charged with the performance of a certain public duty or service and no action will lie against the city for their negligence or improper conduct while acting in the discharge of their official duty."

In the Welsh case the repair complained of was being done by the first assistant engineer, under the direction of the trustees. Under the Rutland charter the duties of the engineers and wardens were to inquire into the condition of the property of the fire department and to supervise and care for the same, and report its condition to the trustees of the village as often as circumstances rendered it necessary, for the safe-keeping and proper repair of such property. This would seem to indicate that the duties of the engineers and wardens were to look after the property and report to the trustees, who were to direct to be made such repairs as they adjudged were necessary, and that was what was done in the Welsh case. The trustees directed the engineer to do what he did do. The act was that of the trustees through the engineer, and from anything appearing in the case, the legal effect of the act would have been the same if performed

by the trustees personally, or by some other persons, not connected with the fire department, under the direction of the trustees. It is the lawful act performed for the public good that determines its governmental character.

It does not appear in the case at bar who located the hydrant complained of, but we are to assume that it was by some one having legal authority to locate and construct it; and, that being so, and for the public good, and that alone, it falls within that class of cases of which the Welsh case is one, and the Sanborn case, and the cases therein cited are others. In the Welsh case it is held as follows: "The fire department and its service are of no benefit or profit to the village in its *corporate* capacity. They are not a source of income or profit to the village, but of expense, which is paid—not out of any special receipts or fund, nor defrayed even in part, by assessments upon particular persons or classes benefited, as in case of sewers or water works—but from the general fund raised by taxation of all the inhabitants." In another place in the opinion of the Court it is said: "While it may be true that the hydrant is no part of the aqueduct, so far as *private* uses of the water thereby supplied are concerned, it is certainly the very means by which the *public* uses of the water—namely, its use for the extinguishing of fires and the like—are obtained."

The Welsh case clearly holds that a hydrant is a public or governmental structure, and it is a matter of common knowledge that it is used exclusively for public purposes, and is so constructed as to be of no value for individual or private uses. This principle is recognized in *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90, in which the court say: "The protection of all the buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are therefore authorized by general laws to provide and maintain fire engines, reservoirs and hydrants to supply water for the extinguishment of fires."

And it is also recognized in *Jewett v. City of New Haven*, 38 Conn. 368, 9 Am. Rep. 382, in which the court quoted with approval from *Wheeler v. City of Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368, as follows: "The laws of this state have conferred upon its municipal corporations powers to establish and organize fire companies, procure engines and other instru-

ments necessary to extinguish fires and preserve the buildings and property within their limits from conflagration; and to prescribe such by-laws and regulations for the government of such companies as may be deemed expedient. But the powers thus conferred are in their nature legislative and governmental."

In *Fisher v. Boston*, *supra*, the court say: "Cities and towns are authorized by law to procure and maintain fire engines and reservoirs of water therefor, and to pay the necessary expense thereof, either by general taxation or out of moneys belonging to the town, because the prevention of damage to buildings by fire is an object which affects the interest of all the inhabitants and relieves them from a common burden and danger, and is therefore within the scope of municipal authority." And further along in the opinion the court say: "In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town house or public way." To the same effect are *Hafford v. New Bedford*, *supra*; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Bigelow v. Randolph*, 14 Gray (Mass.) 541; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485.

The great weight of authority is to the effect that hydrants and apparatus for the extinguishment of fire in a municipality are in their nature public or governmental property, and that for negligence in their use and maintenance for a public purpose no action will lie.

The plaintiff claims that while it may be true that hydrants and apparatus used for the extinguishment of fires in a village or city may be public or governmental property, yet in this case the defendant is liable, because of a faulty execution of the plan for the installation of the fire department. In support of this he can claim no more than is alleged in the declaration, namely, that the hydrant was improperly located. He fails to distinguish between a faulty *execution* of a plan and a faulty *location* of a part of a plan. In the location of a plan the village authorities must necessarily deliberate and adjudge upon the system or plan of location, and such action on the part of the village trustees is in its nature judicial, for which no private action is incurred for errors of judgment or want of forecast. Such is the holding in *Winn v. Rutland*, 52 Vt. 481, much relied upon by the plaintiff, in which the Court say: "In acting under

the chartered power, the village authorities must necessarily deliberate and adjudge upon the system or plan of the work—when to perform it and where to locate it. So far, no liability to private action is incurred for errors of judgment or want of forecast. The inauguration of a plan of sewerage, so long as it remains in mere resolution, cannot in the nature of things, work actionable injury or harm to individuals. Having devised a plan, it may be carried into execution with due care and skill, without risk of private action.”

The same principle is held in *Tainter v. Worcester*, *supra*, in which the court say: “The works to be constructed by the city of Worcester, under the statute of 1864, were, so far as related to safeguards against fire, to be erected and maintained by the city for the benefit of the public and without pecuniary compensation or emolument. The questions whether and where the public hydrants should be erected were within the exclusive control of the municipal authorities, as the public interest might seem to them from time to time to require.”

To the same effect is *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332, in which the court say: “As to common sewers, built by municipal authorities under power conferred by law, it has been held, upon great consideration, that, as the power of determining where the sewers shall be made involves the exercise of a large and *quasi* judicial discretion, depending upon considerations affecting the public health and general convenience, therefore no action lies for a defect or want of sufficiency in the plan or system of drainage adopted within the authority so conferred.”

We think, and so hold, that the location of the hydrant in question was a public and governmental act performed by the defendant through its agents, who acted in the capacity of governmental officers, and that the Welsh case is full authority for this holding, and must control and govern this case.

Judgment affirmed.

R. W. FADDEN v. FANNIE E. FADDEN ET AL.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 16, 1918.

Husband and Wife—Joint Seisin—Property not Held to Sole and Separate Use of Wife—Execution.

A married woman is not alone seized of real estate, conveyed to her by deed not made to her sole and separate use, as of her sole and separate property, nor is her husband alone seized of it, but the two are seized jointly in the wife's right, and as to such property the wife is under the common law disability.

The real estate of a married woman not held to her sole and separate use cannot be taken in execution against her.

APPEAL IN CHANCERY. Heard on bill, answers of the several defendants, and facts found by the Chancellor, in vacation after the September Term, 1917, Franklin County, *Stanton*, Chancellor. Decree for plaintiff. Defendants appealed. The opinion states the case.

Elmer Johnson for plaintiff.

Where real estate is held in the name of a married woman under a deed in common form, as in this case, or other instrument not setting apart the property to her sole and separate use, the respective rights of herself and her husband are determined by the common law, and the husband has a freehold interest therein. *In re Nelson's Will*, 70 Vt. 130; *Laird v. Perry et al.*, 74 Vt. 454; *Hubbard v. Hubbard*, 77 Vt. 73; *Dietrich v. Hutchinson*, 81 Vt. 160; *Rowley v. Shepardson et ux.*, 83 Vt. 167; *Bishop v. Readsboro Chair Mfg. Co.*, 85 Vt. 141; *Barrows v. Dugan's Estate*, 88 Vt. 441; *Citizens Bank v. Jenkins*, 91 Vt. 13.

The possession of property so held is the sole possession of the husband. *Bowen et ux. v. Amsden*, 47 Vt. 569.

P. S. 3037 does not empower a married woman to contract with respect to her property in which her husband has marital

rights. As to such property she is under the same disability as at common law. *Hubbard v. Hubbard*, 77 Vt. 73; *Dietrich v. Hutchinson*, 81 Vt. 160; *Rowley v. Shepardson et ux.*, 83 Vt. 167; *Barrows v. Dugan's Estate*, 88 Vt. 441.

The sole deed of the wife of such property is void. *Dietrich v. Hutchinson*, 73 Vt. 134; *Blondin v. Brooks*, 83 Vt. 472.

A sale on execution of any pretended interest in this property would create a cloud upon the title to the property, and equity will furnish a remedy against such an injury, and it will do this by preventing the cloud as well as by removing it. *American Digest. Vt. Repts.*, Vol. 3, p. 6068; *Note*, 8 L. R. A. p. 729; *Note*, 10 L. R. A. p. 293.

A sale of lands under execution which would confer no title, and the only effect of which would be to cloud the title of others, will be enjoined. *Knightstown First National Bank v. Deitch*, 83 Ind. 133; *Grover v. Webber*, 72 Ill. 607; *Tribbetts v. Fore*, 70 Cal. 242; *Colver v. Phelps*, 130 Ill. 217.

C. G. Austin & Sons for defendants.

The wife's real estate, not set to her sole and separate use has been relieved from the common law marital rights of her husband. P. S. 3041; *Citizens Savings Bank & Trust Co. v. Jenkins*, 91 Vt. 13; *Fox v. Hatch*, 14 Vt. 340; *Dale v. Robinson et al.*, 51 Vt. 20; *Barber v. Root*, 10 Mass. 260; *West v. Laroway*, 28 Mich. 464.

MILES, J. This is a bill in chancery to enjoin the defendants from selling on execution the real estate of the plaintiff's wife. The execution issued upon a judgment recovered by defendants, C. G. & W. R. Austin, against the plaintiff's wife, for professional services rendered for her in the adjustment of matters between herself and the plaintiff. The wife acquired title to the real estate levied upon, by regular conveyance from the plaintiff. The deed conveying the land to her was not made to her sole and separate use, and in no way limited the plaintiff's marital rights, and he then had and still has the possession of the land so conveyed claiming his marital rights to the same. By a stipulation between the plaintiff and his wife, the suit was discontinued as to her and the trial was had with the other defendants.

The only claim made by the defendants, and considered by the court below, as stated by the chancellor in the record sent up to this Court, is that the levy, being made subject to the wife's homestead and the plaintiff's interest, is valid. The defendants recognize the fact that the land is not the sole and separate property of the wife; nor could the defendants consistently claim otherwise in view of the holdings in *Reynolds v. Bean*, 91 Vt. 247, 99 Atl. 1013; *Barrows v. Dugan's Estate*, 88 Vt. 441, 92 Atl. 927; *Bishop v. Chair Co.*, 85 Vt. 141, 81 Atl. 454, 36 L. R. A. (N. S.), 1171, Ann. Cas. 1914 B, 1163; *Rowley v. Shepardson et ux.*, 83 Vt. 167, 74 Atl. 1002, 138 Am. St. Rep. 1078; *Dietrich v. Hutchinson*, 81 Vt. 160, 69 Atl. 661; *Hubbard v. Hubbard*, 77 Vt. 73, 58 Atl. 969, 67 L. R. A. 969, 107 Am. St. Rep. 759, 2 Ann. Cas. 315, and *In re Nelson's Will*, 70 Vt. 130, 49 Atl. 750. The wife of the plaintiff was not alone seized of the real estate levied upon as of her sole and separate property, nor was the plaintiff alone seized of it, "but the two were seized jointly in her right." *Reynolds v. Bean*, *supra*. As to such property she is under the common law disability, and is not aided in that respect by any statute. See the cases above cited, and *Laird v. Perry et al.*, 74 Vt. 454, 52 Atl. 1040, 59 L. R. A. 340; *French v. Slack*, 89 Vt. 514, 96 Atl. 6, and *Citizens Savings Bank & Trust Co. v. Jenkins*, 91 Vt. 13, 99 Atl. 2503.

At common law a married woman could not make contracts binding herself and her property, and it is only by statute that she can now do so. Her right at law to make contracts and bind herself and charge her property, being given by statute, is measured by the statute giving that right. P. S. 3037 (G. L. 3521) is the only statute giving the right to take her property on execution and that statute limits the right to property which she holds to her sole and separate use. The property levied upon not being held to her sole and separate use, was not subject to be taken on the execution in this case.

The decree making the injunction perpetual is affirmed and the cause is remanded.

BRIGHTLOOK HOSPITAL ASSOCIATION v. STANLEY F. GARFIELD.

Special Term at St. Johnsbury, April, 1918.

Present: WATSON, C. J., POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 16, 1918.

Evidence—Contracts—Promise to Pay for Medical Treatment and Care of Another—Trial—Direction of Verdict on Motion by Both Parties.

In an action brought by a hospital association against one who had been injured while in the employ of a telephone company to recover for his care and treatment, evidence on the part of defendant that the general manager of the telephone company, at the time defendant was taken to the hospital, agreed on behalf of the company to pay the expense incurred is admissible as tending to show an express promise to pay the plaintiff which was accepted by the latter and charged against the telephone company; and it is immaterial, if such a contract was made, whether the general manager had authority to bind the company for if he had not such authority he bound himself.

Where neither party wishes to go to the jury on any issue of fact, it is for the court to direct a verdict for one party or the other on such a state of facts as it regards proved by the evidence, and the verdict will be upheld if there is any evidence to sustain it.

Where, in an action brought by a hospital association to recover for treatment and care furnished to defendant, there is shown an express promise of another person to meet the expense, made at the time defendant was brought to the hospital, and understood to be original and not collateral by such person, the defendant and the hospital authorities, no promise implied in law arises on the part of defendant.

ASSUMPSIT. Plea, the general issue. Trial by jury at the December Term, 1917, Caledonia County, *Wilson, J.*, presiding. At the close of the evidence both parties moved for a directed verdict, and the court thereupon directed a verdict for defendant. Plaintiff excepted. The opinion states the case.

Dunnett, Shields & Conant for plaintiff.

Porter, Witters & Harvey for defendant.

MILES, J. On the 22nd day of August, 1913, the defendant, while working for the New England Telephone Company, was severely injured and taken to the plaintiff's hospital in St. Johnsbury, where he was treated and cared for until November 3, 1913, incurring an expense in the sum of \$167.19. This action of contract, on the common counts, is brought to recover that sum. It is conceded by the defendant that, if the plaintiff is entitled to recover, it is entitled to recover that sum with interest on the same from November 3, 1913, to the date of judgment. The general issue was pleaded and the case was tried by jury at the December term of the Caledonia County Court, 1917.

The plaintiff seeks to recover on a promise implied by law. The defendant defends on the ground that the liability was incurred by the New England Company or by its general manager, C. E. Merrill, under an express contract between Merrill and the plaintiff, with the understanding of the plaintiff, defendant, and the New England Telephone Company, through its general manager, at the time the defendant was taken to the hospital, that the telephone company was to pay the expense for the care and nursing of the defendant while at plaintiff's hospital.

The first exception taken and relied upon by the plaintiff was to the testimony tending to show the contract claimed by the defendant to have been made by Merrill, on behalf of the telephone company, with Mrs. Flora Lovejoy, matron of plaintiff's hospital, on behalf of the plaintiff, in which it was agreed that the telephone company should bear the expense incurred by the plaintiff in the care of the defendant, and that this contract was made in accordance with the understanding of the defendant, Merrill and Mrs. Lovejoy, Merrill acting on behalf of the telephone company and Mrs. Lovejoy on behalf of the plaintiff. The objection to this evidence was based upon the ground that Merrill had no authority to bind the telephone company, and that the defendant, having received the benefit, with full knowledge of the same, a promise implied in law created a liability on his part, and that the promise of the telephone company, if one was made, was collateral, and did not extinguish the original liability of the defendant.

It is immaterial whether Merrill had authority to bind the telephone company; in other words it is of no importance whether the contract, which the defendant relies upon, was with the telephone company or with Merrill. If such a contract was made, allowing that Merrill had no authority to bind the telephone company, he would bind himself. *Clark v. Foster*, 8 Vt. 98; *Roberts v. Button*, 14 Vt. 195; *Royce v. Allen*, 28 Vt. 234; *Clay v. Wright*, 44 Vt. 538; *Hinsdale v. Partridge*, 14 Vt. 547. The testimony was therefore admissible as tending to show an express promise to pay the plaintiff for the expenditures on behalf of the defendant which was accepted by the plaintiff and charged by the plaintiff against the telephone company. This holding is not in conflict with *Sias v. Consolidated Lighting Co.*, 73 Vt. 35, 50 Atl. 554; *Whitwell et al. v. Warner et al.*, 20 Vt. 426; *Roben v. Ryegate Light & Power Co.*, 91 Vt. 402, 100 Atl. 768; *Lyndon Mill Company v. Lyndon Literary & Biblical Institution*, 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

The remaining exception to be considered is to the court's refusal to direct a verdict for the plaintiff and to its direction of a verdict for the defendant. Since it affirmatively appeared from the record that neither party wished to go to the jury on any issue of fact, it was for the court to direct a verdict for one party or the other on such a state of the facts as it regarded proved by the evidence, and the verdict will be upheld if there was any evidence to sustain it. *Lowe v. Vermont Savings Bank*, 90 Vt. 532, 98 Atl. 1023. An examination of the transcript, referred to in the bill of exceptions, discloses that there was substantial evidence sustaining it. The evidence was clear that Merrill promised to pay the plaintiff for the care and nursing of the defendant while at its hospital, and that promise was original and not collateral, and that it was so understood by the defendant and by Merrill and Mrs. Lovejoy.

The express promise of Merrill being shown, no promise implied in law arises on the part of the defendant. *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865. The plaintiff's claim that Merrill's promise was collateral cannot be sustained, for there was no evidence in the case tending to support it. If the promise was made by Merrill, as the evidence tends to show, and as the court must have found, it was original, and he or the telephone company, to whom the credit was given, is liable on that promise.

Judgment affirmed.

D. H. McDONALD v. FREDERICK McNEIL.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 16, 1918.

Fraud—Intent to Deceive—Liability—Deceit in Sale or Exchange of Property—Measure of Damages—Trial—Motion for Verdict—Witnesses—Contradictory Statements—Jury Questions—“Falsely and Fraudulently”—Motion to Set Aside Verdict—Discretion of Court.

In an action for deceit, an actual motive to do injury to plaintiff is not essential, but if a false representation is made with knowledge of its falsity, the intent to deceive is presumed.

Liability for deceit grows out of the fact that plaintiff has been misled to his prejudice, and not that defendant has profited by his wrong, and so it is not necessary to show that defendant acted from motive of personal advantage, and the fact that he actually gained nothing by the deception, but lost as much as the plaintiff, does not prevent a recovery.

In an action for deceit in the sale or exchange of real or personal property, the damages are to be measured by the difference between the property as it is and as it would be if as represented; and this rule is applicable where defendant by misrepresentations induced plaintiff to furnish the money to buy certain land, take the title jointly with defendant, and give the latter credit for his half of the investment.

In an action in tort for deceit, there being evidence tending to show fraud and misrepresentation on the part of defendant, the latter's motion for a directed verdict was properly overruled.

Where a party, in his evidence, makes contradictory statements, it is for the jury to say which of such statements they will accept.

Where a complaint in deceit alleges that the alleged misrepresentations were falsely and fraudulently made, no express averment of an intention to deceive is necessary, because the terms “falsely and fraudulently”, when applied to misrepresentation inducing one to act to his injury, necessarily imply a deliberate intent to deceive.

A motion to set aside a verdict is addressed to the discretion of the trial court, and where that discretion is neither withheld nor abused, its ruling thereon will not be revised.

ACTION of tort for deceit. Plea, the general issue. Trial by jury at the March Term, 1916, Washington County, *Butler, J.*, presiding. Verdict for plaintiff. Defendant excepted.

At the close of all the evidence, defendant moved for a directed verdict, the ground of which motion is stated in the opinion. Motion overruled, defendant excepted. The case is stated in the opinion.

Fred L. Laird for defendant.

John W. Gordon for plaintiff.

POWERS, J. This is a tort action for false representations whereby the plaintiff was induced to purchase a certain piece of real estate. There was evidence tending to show that the defendant, who owned a piece of land on the shore of Cold Stream Lake, in Penobscot County, Maine, by falsely and fraudulently representing to the plaintiff that a ninety acre lot contiguous to the one above mentioned had growing upon it eight hundred large hemlock trees, one hundred and fifty-three large pine trees, a certain large number of cords of bobbin-stock white birch, and other valuable wood and timber, and that there were twenty-five valuable cottage lots on that part of the lot bordering on the lake, induced the plaintiff to furnish the money and buy said ninety acre lot and to take the title thereto to said parties jointly, and to give the defendant credit for his half of the investment; that it turned out that the number of pine and hemlock trees was grossly overstated; that the quantity of wood and lumber was greatly exaggerated; that the shore land was too wet to be available for cottage lots; and that the value of the land bought was much less than represented.

The trial below was by jury, and the verdict was for the plaintiff. By special verdicts, the jury found that the defendant induced the plaintiff to furnish the money and buy the land by false statements and representations knowingly made with intent to deceive; that the plaintiff relied upon them believing them to be true; that the property in question was worth \$1,900; and

that it would have been worth \$800 more, if it had been as represented.

The case, then, presents the novel feature of one held for a tort by which he, himself, lost as much as the other party. This feature does not prevent a recovery. Ordinarily, the parties to actions of this character stand in the relation of vendor and vendee, or as parties to an exchange of property. But such relations are not essential to the right of recovery. Liability grows out of the fact that the plaintiff has been misled to his prejudice, and not that the defendant has profited by his wrong. An actual motive to do injury to the plaintiff is not essential, but if a false representation is made with knowledge of its falsity, the intent to deceive is presumed. 12 R. C. L. 349; note to *Cottrill v. Krum*, (Mo.) 18 Am. St. Rep. 561. It is not necessary to show that the defendant acted from motives of personal advantage (*Whiting v. Price*, 169 Mass. 576, 48 N. E. 772, 61 Am. St. Rep. 307), and the fact that he actually gains nothing by the deception is not controlling. *Pasley v. Freeman*, 3 T. R. 51, 2 Smith L. C. 1300, and note; *James v. Crossthwait*, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631; *Endsley v. Johns*, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; *Medbury v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; *Chellis v. Cole*, 116 Me. 283, 101 Atl. 444. In *Ewins v. Calhoun*, 7 Vt. 79, the defendant gained nothing by his fraud, yet he was held liable; and in *Paddock v. Fletcher*, 42 Vt. 389, it was said that the defendants were liable for their deception whether its fruits went into their own pockets or not.

With these rules in mind and the special verdicts before us, we find little difficulty in disposing of the question of liability. Though the defendant lost equally with the plaintiff by the purchase, he knowingly misrepresented material matters, and did this in circumstances rendering him liable to the plaintiff for his share of the loss.

In actions for deceit in the sale or exchange of real estate, two different rules for the assessment of damages have grown up, each recognized by courts of the highest authority. One is that the damages are to be measured by the difference between the property as it is and as it would be if it was as represented. The other is that the damages are to be measured by the difference between the value of the property and the price paid. Our rule is the one first above stated. It applies as well to personal as to real property, to sales and exchanges, and is too firmly estab-

lished to be questioned. *Bowman v. Parker*, 40 Vt. 410; *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367; *Belka v. Allen*, 82 Vt. 456, 74 Atl. 91; *Howton v. Strout Farm Agency*, 90 Vt. 50, 96 Atl. 330; *Maidment v. Frazier*, 90 Vt. 520; *Turner v. Howard*, 91 Vt. 49, 99 Atl. 236. This was the rule applied to the case before us,—the plaintiff being allowed to recover one-half the difference between the value as it was and as it was represented. The defendant excepted, and insists that the second rule above specified should have been applied. So it remains to consider whether the facts that the defendant gained nothing by the transaction and was to become a partner in the enterprise affect the question.

It is to be noted that it is not the case of one partner deceiving another. The deception preceded the partnership. It was the deception that resulted in forming the partnership. So the fact that the defendant became a part owner as one of the results of his misrepresentation does not affect the quality of his conduct or the results flowing from it. He stands no differently than one wholly disinterested. The plaintiff's situation is affected by this relation only to the extent that he is relieved of one-half of the loss he would otherwise have sustained.

We see no logical reason why the damages here should not be assessed under our usual rule. We find no case wherein any such distinction as the defendant insists upon has been discussed, though the rule we adopt appears to have been applied in several cases. *Medbury et al. v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726, was an action brought against a third person for fraudulent representations regarding the cost and value of a certain tannery. One of the plaintiffs sold out his interest in the property for just what he paid for it, and it was urged in behalf of the defendant that as one of the plaintiffs had suffered no loss, there could be no recovery. But the court held otherwise, saying, in effect, that if through fraud he paid a higher price than the estate was worth, he was entitled to damages, without regard to what disposition he afterwards made of the property.

In *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188, a manufacturer was induced by the defendant's false and fraudulent representations to sell his goods on credit to an insolvent corporation, and was allowed to recover their full value, though this included his usual profit.

In *Lee v. Tarplin*, 183 Mass. 52, 66 N. E. 431, one induced by the false and fraudulent representations of a third party to accept a mortgage in part payment for property was allowed to recover the difference between the value of the mortgaged property and what it would have been if as represented.

Page v. Wells, 37 Mich. 415, was a case not wholly unlike the one in hand. There the defendant, under an arrangement which the court construed as a contract of employment, was to ascertain and report to the plaintiff the facts affecting the quality, quantity and value of certain pine lands. A report having been made pursuant to the arrangement, the plaintiff bought the lands in reliance thereon. The event showed that the lands were misrepresented in the reports, and suit was brought for damages. In disposing of the question of damages, Judge Cooley said: "If the plaintiff was induced to purchase lands on representations which proved to be untrue, the measure of his loss, as it seems to us, would be perfectly plain, and would be reached by an answer to the following question: 'How much less is the land worth as it is, than it would have been if its condition and quality had been as represented?'"

That was an action of assumpsit, but we see no reason why the language of the court is not equally applicable to an action of tort. Then, too, in that case, the defendant was paid a specific price for making the examination and report, while here the advantage which the defendant expected to gain was to come through being taken in on credit as an equal owner. This difference does not, however, distinguish the cases, so far as applicable legal rules are concerned. The plaintiff was entitled to the benefit of his bargain. The defendant should make it good to him. Courts holding to the other rule say that a plaintiff should not be allowed to speculate out of the defendant's wrongs; to that we reply, nor should a defendant be allowed to gamble on it. And under their rule, the temptation to interfere in the affairs of others, in order to help a friend or punish an enemy, would be greatly enlarged. If active fraud is to carry no greater penalty than to make price and value agree, honesty will not be much encouraged.

There was no error in overruling the defendant's motion for a verdict. The defendant's claim that there was no evidence tending to show fraud or misrepresentation is not supported by the transcript, which is referred to. The defendant knew that

the plaintiff was wholly unacquainted with this land and was relying entirely on what he said about it. He admitted that he made most of the representations complained of, but claimed that he merely quoted what Mr. Appleby, the owner, said about it. But the plaintiff and his wife, who were present, testified that the defendant did not quote Appleby, but made the statements of his own knowledge, and that he claimed that he had actually counted the hemlock trees. As to the cottage lots and what was said about them, the defendant insisted on the stand that his statements were true.

It is true as claimed by the defendant that in some particulars the plaintiff's testimony was somewhat contradictory. But the result is not what is claimed for it; it was for the jury to say which of such statements they would accept. *Pocket v. Almon*, 90 Vt. 10, 96 Atl. 421.

An express averment of an intention to deceive was unnecessary. It is alleged in the declaration that the representations were "falsely and fraudulently" made. The word "falsely" in some connections implies a purpose to deceive (*State v. Smith*, 63 Vt. at p. 211, 22 Atl. 604); and the term "fraudulently" includes the idea of intentional deception. *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598. When in a tort action the terms "falsely and fraudulently" are applied to misrepresentations inducing one to act to his injury, they necessarily imply a deliberate intent to deceive. *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974, Ann. Cas. 1913 A, 386; *Bank of Montreal v. Thayer*, 7 Fed. 622; *Eibel v. Von Fell*, 64 N. J. Law 364, 48 Atl. 1117; *Hammatt v. Emerson*, *supra*.

There was no error in overruling the motion to set aside the verdict. It was addressed to the discretion of the court, and that discretion was neither withheld nor abused. *Lincoln v. C. V. Ry. Co.*, 82 Vt. 187, 72 Atl. 827, 137 Am. St. Rep. 998; *French v. Wheldon*, 91 Vt. 64, 99 Atl. 232.

Judgment affirmed.

IN RE ESTATE OF ALONZO A. MARTIN.

January Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 16, 1918.

Wills—Testamentary Capacity—Mental Condition of Testator—Trial—Correct Ruling for which Wrong Ground is Suggested—Examination of Witnesses—Discretion of Court—Leading Questions—Evidence—Weight—Appeal and Error—Regularity of Proceedings Below Assumed by Supreme Court—Grounds of Objection Not Presented Below—Trial—Remarks of Counsel—Admissibility of Evidence—Exceptions—When Not Sustained—Testimony at Former Trial—When Admissible—Finding of Inability of Witness to Attend—Construction of—Waiver of Right of Objection to Testimony—Bill of Exceptions without Reference therein to Transcript—Experts—Opinion Evidence—When Inadmissible—Mental Capacity—Jury Question—Exceptions Not Extended Beyond Point Raised Below.

When the issue of testamentary capacity is raised, the inquiry is conducted under liberal rules of procedure and it is competent, as bearing on this question, to show the person's mental condition at any reasonable time before or after the testamentary act, the range of inquiry depending upon the character of the alleged unsoundness and other circumstances, and resting largely in the discretion of the trial court.

A ruling, for which a wrong ground is suggested, is not error, if it is in fact correct.

It is within the discretion of the trial court to allow testimony, which is not in the line of strict cross-examination, where it is manifest that its admission does not result in any surprise or prejudice to the opposing party, and the fact that the other party's case is in some respects anticipated thereby is of no consequence.

It is within the discretion of the trial court to allow leading and suggestive questions to be asked.

The facts that a witness as to testamentary capacity had only known the decedent for about three weeks before his death, and that he

was then very weak and sick, affected the weight of her testimony and not its admissibility.

The question whether a witness has had an adequate opportunity of observation in circumstances calculated to result in an inference helpful to the jury, is largely one of administration and within the discretion of the trial court.

Where the record does not show that a proper foundation for the admission of certain testimony was not laid on trial, the Supreme Court will assume that it was laid.

Where, in an appeal from probate, the person who drew the will testified that the conduct of decedent's wife at the time was of such a nature that he asked for a separate room in which to complete the business, it was not error to allow the wife, in answer to a question whether her conduct was such that there was any reason for the request, to testify that she might have been a little excited, but was not loud or quarrelsome.

A ground of objection to evidence, not presented in the trial court, will not be considered in Supreme Court.

Where counsel, in good faith, after explaining his claim with regard to evidence offered by him, which was excluded, made a further explanation in the hearing of the jury, who were cautioned by the court not to try the case on statements of counsel, but on the evidence, an exception to such remarks of counsel which were not withdrawn by him will not be sustained.

In an appeal from probate, evidence that formerly the decedent had confidence in the business ability of the witness and entrusted her with certain business matters, but from and after a certain time, his opinion of and mental attitude towards her business ability materially changed, is admissible upon the issue of testamentary capacity, it being the theory of the contestant that a decided change came over decedent at or about this time.

Where there is not enough shown by the record to make certain testimony either admissible or inadmissible, no harm is shown and an exception to its admission will not be sustained.

In a civil case, the testimony of a witness given at a former trial between the same parties may be introduced if the witness has since died or become insane, is sick and unable to testify, is out of the jurisdiction, or has been kept away by the other party, and it will be assumed that the rules laid down for the guidance of the trial court in determining the preliminary questions of fact have been followed, in the absence of a showing to the contrary.

The finding of the trial court that a witness, whose testimony at a former trial between the same parties was offered in evidence, was unable to attend court or give a deposition, will be assumed to mean that he was physically unable to do so.

Where the testimony is not before the Supreme Court, and from the record it cannot be said that certain testimony could not be admissible in any state of the evidence, an exception thereto will not be sustained, all intendments being in favor of the ruling.

Where evidence comes in without objection, all right of objection is waived, and it is within the discretion of the trial court whether to hold the party to this waiver, or to strike out the testimony.

Where the transcript is not referred to, the Supreme Court can only consider what expressly appears in the bill of exceptions.

The admission in evidence of an opinion of an expert witness, based upon all the evidence in the case, which included the conflicting opinions expressed by other witnesses, who had preceded him, is reversible error.

It was error to allow a remark of counsel that there was a disposition on the part of the other side to interfere with the examination of a witness, to go unwithdrawn and unrebuked; but whether or not such error was prejudicial is not decided.

In determining the mental capacity of a testator, the jury may consider the naturalness or unnaturalness of the will.

A specific exception will not be extended in Supreme Court beyond the precise point made in the court below.

APPEAL FROM PROBATE. Trial by jury at the Special June Term, 1917, Windsor County, *Stanton, J.*, presiding. Verdict for contestant. Proponent excepted. The opinion states the case.

Davis & Davis and *Pingree & Pingree* for proponent.

Charles Batchelder, William Batchelder and *Frank Plumley* for contestant.

POWERS, J. On January 26, 1916, Alonzo A. Martin executed an instrument purporting to be his last will and testament. The validity of this instrument is here in question, and the only ground of contest is that he was then of unsound mind and incompetent to make a will. The trial below was by jury

and resulted in a verdict against the instrument. The case comes up on exceptions saved by the proponent.

Witnesses for the contestant were allowed, subject to the proponent's exception, to relate facts and observations covering an extended period prior to the execution of the instrument in question, and subsequent thereto down to Mr. Martin's death, and thereon to predicate opinions that he was not of sound mind. We cannot say that such evidence was not material. The *factum probandum*, was, of course, his mental condition on January 26, 1916. But when the issue of testamentary capacity is raised, the inquiry is conducted under liberal rules of procedure (*In re Esterbrook's Will*, 83 Vt. 229, 79 Atl. 1), and it is competent, as bearing on this question, to show the person's mental condition at any reasonable time before or after the testamentary act. In *re Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013. Just how wide a range is permissible in a given case depends upon the character of the alleged unsoundness and other circumstances, and rests largely in the discretion of the trial court. 3 Elliott Ev., § 2692. We are not convinced that too much latitude was here allowed.

One of these witnesses was E. D. Ainsworth, a subscribing witness to the will, and it is claimed by the proponent that the contestant was allowed to examine him under the rules governing a cross-examination, and it is insisted that this was error. The argument is that the law required the proponent to introduce this witness, and that such a witness is not vouched for by the party producing him; that there is no cross-examination of such a witness in the ordinary sense of the term; and that it was unfair and prejudicial to allow it in this case. It is plain from the record that the court treated the matter as a cross-examination, but it is equally plain that it allowed it to thus proceed as a matter of discretion. So if any wrong ground was suggested for the ruling, the ruling itself was right, and no error appears. *Fairbanks v. Stowe*, 83 Vt. 155, 74 Atl. 1006, 138 Am. St. Rep. 1074.

The contestant was allowed to take answers from some of the witnesses which were not in the line of strict cross-examination, and the proponent excepted. But no error is shown. It is not made manifest that the admission of this testimony in this way resulted in any surprise, or prejudice to the proponent's case, and it was therefore within the discretion of the court to allow it. *Slack v. Bragg*, 83 Vt. 404, 76 Atl. 148; *State v. Pierce*, 87

Vt. 144, 88 Atl. 740. The fact that in some respects this was to anticipate the contestant's case is of no consequence. *In re Mason's Will*, 82 Vt. 160, 72 Atl. 329.

The contestant was allowed, subject to exception, to ask leading and suggestive questions to certain witnesses. This, too, was within the discretion of the trial court. *Berry v. Doolittle*, 82 Vt. 471, 74 Atl. 97.

The opinion of the decedent's mental condition given by Mary Hope, the trained nurse who took care of him from February 15, 1916, to his death on March 6, of the same year, was not inadmissible. It is true that the witness had not previously known the decedent, and that he was then very weak and sick; but these facts only affected the weight of her testimony and not its admissibility. *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 24 Atl. 253. Here, again, the law does not lay down a hard and fast rule, and the question whether the witness has had an adequate opportunity of observation, in circumstances calculated to result in an inference helpful to the jury, is largely one of administration, and within the discretion of the trial court. 3 Chamb. Ev., § 1912.

Mrs. Martin, the widow of the decedent and the real contestant, was a witness. In her direct examination, she was asked by her counsel if there came a time when it appeared to her that her husband became suspicious that she was trying to beat him in money matters. Subject to exception, she replied in substance that there did come such a time and that it was in 1915. The only point now made in support of this exception is that no foundation was laid by showing the particular facts from which this inference was drawn. A sufficient answer is, that the record does not show that such a foundation was not laid, and therefore we will assume that it was. *Sargent v. Barton*, 74 Vt. 24, 52 Atl. 72.

It appears that Gov. Pingree drew the will in question, and went to the decedent's residence for that purpose. He testified that while he was there, Mrs. Martin's conduct was so strenuous and the scene she made so stormy, that he asked for a room where he could have Mr. Martin alone to complete the business. When Mrs. Martin was on the stand, her counsel asked her if her conduct on that occasion was such that there was any reason for Gov. Pingree's asking for a separate room. To this the proponent objected; and subject to exception, the witness was al-

lowed to answer that she might have been a little bit excited, but that she was not strenuous, nor loud, nor quarrelsome. The argument of the proponent assumes that the witness was allowed to express an opinion on the propriety of Gov. Pingree's action. But this is not what the witness did; she simply stated the facts as she claimed them to be. This is just what counsel then said they were willing she should do, and just what she could properly do.

Mrs. Martin was allowed to testify to a conversation had with her husband in the fall of 1897, which resulted in an arrangement whereby she took on the management of the business at Martinsville. To this the proponent excepted. The objection below was specific. It was that Mr. Martin being dead, the living party "shouldn't be allowed to come in here and swear contracts onto the dead one." The only point here made is that the statute does not allow one spouse to testify to a conversation with the other, and that the death of the latter does not affect the question. Here, then, is a new objection not made below. In these circumstances neither point is considered. *Jewell v. Hoosac, etc. R. R. Co.*, 85 Vt. 64, 81 Atl. 238; *Goslant v. Calais*, 90 Vt. 114, 96 Atl. 751. Exactly the same situation exists regarding the conversation about the keys to the box of securities, and for the same reason the exception is overruled.

During Mrs. Martin's examination, her counsel asked her a question which was objected to. Thereupon, counsel explained his position in regard to the question, and the court ruled it out. Contestant's counsel then (apparently in good faith) made a further explanation of his purpose, but the ruling was adhered to. The proponent claimed an exception to this further explanation unless it was withdrawn. Counsel refused to withdraw it and an exception was allowed. The court then turned to the jury and cautioned them against trying the case upon statements by counsel, and admonished them to be guided only by the evidence admitted. The exception is not sustained. However it might have been if the record showed that counsel had attempted to get something improper before the jury by his statement to the court, or, however it might have been if the matter had not been adequately handled by the court, it must be held on the record that the remarks were not improper and that there was no obligation to withdraw them.

Clara Dole, a sister of Mrs. Martin, was a witness for the contestant. She gave testimony tending to show that formerly Mr. Martin had confidence in her business ability and intrusted certain business matters to her charge, but that from and after the winter of 1914-15, his opinion of and mental attitude toward her business ability materially changed. This evidence was properly admitted. It was the theory of the contestant, and her evidence tended to show, that a decided change came over Mr. Martin at or about this time. That such a change is evidence of failing mentality is well recognized. The testimony of Mrs. Dole was confirmatory of this claim and admissible as a manifestation of the change referred to. This witness also testified that when she was at the Martin place, there was money in the purse. There is not enough shown by the record to make this testimony admissible, nor is there enough shown to make it inadmissible. No harm is shown and the exception is not sustained.

Michael Ryan was a witness before the probate court when the issue here was there tried out, and his testimony was taken by a stenographer. A transcript of that testimony was offered below, and the only objection made to its admission was that Mr. Ryan was then in the State, and that it was only when the witness had gone out of the jurisdiction that such evidence was admissible. The court found the fact to be that Mr. Ryan was within the State, but unable to attend court as a witness or to give a deposition. The rule regulating the use of the former testimony of an unavailable witness differs in different jurisdictions. The one generally obtaining is that in a civil case, the testimony of a witness given at a former trial between the same parties may be introduced if the witness had since died or become insane, is sick and unable to testify, is out of the jurisdiction, or has been kept away by the other party. Some well-recognized rules are laid down for the guidance of the trial court in determining the preliminary questions of fact, and in the absence of any showing to the contrary, we assume that these were duly observed. So, too, we assume that the finding that this witness was "unable" to attend court or give a deposition means that he was too ill to do so. This afforded a sufficient reason for admitting his former testimony. 10 R. C. L. 966; 2 Chamb. Ev., § 1646; 2 Wig. Ev., § 1406; Stephen's Dig., 159, *et seq.*; *Chase v. Springvale Mills Co.*, 75 Me. 156; *Perrin v. Wells*, 155 Pa. 299, 26 Atl. 543.

When the transcript of Mr. Ryan's testimony was presented, certain questions and answers were stricken out by agreement of counsel, and the remainder was read to the jury. The proponent excepted to the failure of the court to strike out certain statements therein made by the witness complimentary to the contestant and her care of the decedent. It is quite probable that the admission of these statements violated the rule laid down in *Turner v. Howard*, 91 Vt. 49, 99 Atl. 236, and *Adams v. Cook*, 91 Vt. 281, 100 Atl. 42, but the record before us is too incomplete to show it. As we have seen, the testimony is not before us. All intendments are in favor of the ruling. We cannot say that this testimony could not be admissible in any state of the evidence, and we must, therefore, assume that it was made admissible by evidence not here shown. *Tenney v. Harvey*, 63 Vt. 520, 22 Atl. 659. Nor can we say that the statement of Mary A. Durphy as to a conversation between W. D. Martin and the decedent was inadmissible. There is not enough shown to make error appear. What W. D. Martin said, standing alone, may not have been important; but the fact that his remark brought no reply from the decedent may have been of significance. The record is too meager to warrant sustaining the exception.

Mrs. Durphy testified to a conversation between Mr. and Mrs. Martin, which we understand to have taken place at the Lake Sunapee camp. She was asked if she said anything, and replied that she did; she was asked what she said, and replied that she told Mrs. Martin that she had better go home and stay for awhile, for "it was getting on her nerves so that she was going to break down under it." Then she was asked if, in pursuance to this talk, she (Mrs. Martin) did go home, and at this point objection was made. The court recognized the fact that the objection came too late, treated it as a motion to strike out, allowed the testimony to stand, and gave the proponent an exception. The evidence came in without objection, and all right of objection was waived. It was within the discretion of the court whether to hold the proponent to this waiver or strike out the testimony.

Dr. Grout was a witness for the contestant. He had heard all the evidence in the case and was allowed to predicate an opinion of Mr. Martin's sanity thereon. This was excepted to on the ground that there was a conflict in the testimony given by the witnesses and that the witness was allowed to consider the

opinions expressed by them. If there was no conflict in the evidence as to any of the material facts detailed by the witnesses, and the opinions were excluded, the course taken with Dr. Grout was permissible. *State v. Hayden*, 51 Vt. 296. But we think that it sufficiently appears from the record that there was such a conflict. It is true that the transcript is not referred to, and we can only consider what expressly appears in the bill of exceptions. But when the ruling was made, counsel for the proponent strenuously insisted that there was such a conflict, and this does not appear to have been disputed by the contestant. Moreover, it appears that witnesses for the proponent gave evidence of Martin's "actions, doings and sayings," and predicated thereon opinions that he was sane; while witnesses for the contestant gave similar evidence, and predicated thereon opinions that he was insane; and that some of such evidence related to the same occasions. It would be hardly possible that such evidence would be entirely free from conflict; and the only fair inference from the record is that each group of witnesses testified to facts supporting his opinion. So, when the evidence related to the same occasions it must have been conflicting; otherwise, it would not have tended to support the conflicting opinions. Besides, the witness was allowed to take into consideration all that the witnesses had said "of and concerning" the acts and sayings of the decedent, which must have left him free to consider what was said "concerning" such acts as indication of sanity or insanity. And finally, the court, itself, in making the ruling recognized the existence of such a conflict by suggesting that the question asked did not eliminate the conflicting testimony but included it all. From the whole record it is plain that the court appreciated that there was a conflict such as the proponent claimed, and understandingly admitted Dr. Grout's opinion based in part upon the opinions expressed by the witnesses who had preceded him. This was error, and was necessarily harmful, and requires a reversal.

Dr. Keyes was a witness for the contestant. In his direct examination he was asked a question to which the proponent's counsel objected. Thereupon, counsel for the contestant remarked, "I'll put a new question inasmuch as there's a disposition on the part of the other side to interfere with the examination." To this the proponent excepted. The remark was unwarranted, and to allow it to go unwithdrawn and unrebuked was error. But in view of the fact that the case is to be reversed

on another point it is unnecessary to determine whether it was prejudicial or not.

The court charged the jury that it might consider the naturalness or unnaturalness of the will in determining the question of mental capacity. To this the proponent excepted. There was no error in this instruction. *Fairchild v. Bascomb*, 35 Vt. 398; *Crocker v. Chase*, 57 Vt. 413. The proponent complains that no definition of the term "naturalness" was given the jury. But that was not the point made below. The exception taken was specific, and will not here be extended beyond the precise point there made. *Graves v. Waitsfield*, 81 Vt. 84, 69 Atl. 137.

Judgment reversed and cause remanded.

FRANCIS B. HUTCHINS v. F. J. GEORGE AND TRUSTEE.

Special Term at Brattleboro, February, 1918.

Present: WATSON, C. J., HASLTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 17, 1918.

Judgments—Judicial Notice—Conclusiveness—Bill of Exceptions—Insufficient Statement of Questions Raised on Trial—Running Account—Single Cause of Action—Evidence—Offer.

The judgment and proceedings in another case than that on trial, even between the same parties, will not, as a rule, be taken notice of by the court of its own motion.

Former judicial proceedings between the same parties in the same court prove themselves when offered in evidence, since a court takes judicial notice of the authenticity of its own records.

A request of a party that the court take notice of a former judgment between the same parties in the same court, and the specifications upon which the judgment was based, is in effect an offer of the proceedings in evidence, and where relevant and seasonably made, the matters are properly before the court for consideration.

A party is not precluded by a judgment against him by default from claiming, in a subsequent action brought by him against the plaintiff in the former suit, certain items of indebtedness which existed before the rendition of the default judgment, because it was his privilege either to place these items in offset in the first suit, or to make them the basis of a later one, although if the former suit had been book account, the matter of costs might be affected by the course taken.

Where the bill of exceptions states only what the excepting party claimed and how he treated certain items in dispute, and gives no further information of the evidence or offers of evidence in regard thereto, the ruling of the trial court will not be disturbed.

A claim under a running account of mutual dealings covering a considerable period of time is generally regarded as a single cause of action not to be split up by separate suits upon various items.

If a party relies upon an exception to a principle announced by the trial court, he should at least make a definite offer of evidence calculated to take his case out of the general rule; and where it does not appear by the bill of exceptions that such offer was made, the ruling of the trial court will not be disturbed.

ASSUMPSIT. Plea, the general issue, and set-off. Trial by the Montpelier City Court, *Erwin M. Harvey*, Judge. Judgment for plaintiff. Defendant excepted. The opinion states the case.

William C. White for plaintiff.

F. J. Marshall for defendant.

HASELTON, J. This is an action of contract in the form of general assumpsit brought before the City Court of Montpelier. The defences were the general issue, or denial, and set-off. Trial was by the court and judgment was rendered for the plaintiff to recover \$22.82, as damages, and costs. The defendant brings a bill of exceptions.

The writ in this case was dated December 7, 1916. The defendant had previously brought an action in the form of general assumpsit against the plaintiff. That action had been returnable, to the court that tried this, November 13, 1916, and, the defendant there, the plaintiff here, not having appeared,

judgment in that action had been rendered on his default for damages \$10.50 and costs. On the trial of this case a certified copy of the record of the former judgment was not offered by either party, but the files therein were at hand in the possession of the court; and at the request of the plaintiff, the court took notice of the former judgment and the items of the specification therein, and considered them in the determination of this case. To this action of the court the defendant excepted on the sole ground that a court has no right to take judicial notice of its own judgments. As a rule the judgment and proceedings in another case than that on trial, even between the same parties, will not be taken notice of by the court of its own motion. Otherwise matters might be considered that a party has no opportunity to meet and explain. 15 R. C. L. 1114. But when former judicial proceedings between the same parties in the same court are offered in evidence they prove themselves, since a court takes judicial notice of the authenticity of its own records, and where such former proceedings are relevant and are seasonably offered they are, without more, properly in the case. Here the request of the plaintiff, that the court take notice of the former judgment and the specification on which it was based, was in effect an offer, and nothing appears to indicate that it was not seasonably made, and no question of relevancy is raised. Therefore, so far as appears, the matters noticed by the court were properly before it for consideration. *State v. Shaw*, 73 Vt. 149, 160, 50 Atl. 863; *Armstrong v. Colby*, 47 Vt. 359, 361, 364.

Some or all of the items of the specification of the plaintiff in this suit (*Hutchins v. George*) were for indebtedness claimed to have accrued prior to the bringing of the former action (*George v. Hutchins*), in which Hutchins did not appear but suffered judgment to go against him by default. These items were considered by the court, against objection and exception on the ground that Hutchins was precluded as to such items by the judgment against him in the suit in which he suffered default, the respective claims of the parties being such that in that suit Hutchins might have declared in offset on the claim for which he now brings suit. But, under our statute, it was not obligatory upon him to do so. He could fail to exercise his privilege in that regard without prejudice to his own claim in a suit brought by him. P. S. 1507 (G. L. 1806); *Kezar v. Elkins*, 52 Vt.

119, 120-121; *Davenport v. Hubbard*, 46 Vt. 200, 206, 14 Am. Rep. 620; *Carver v. Adams*, 38 Vt. 500.

We note that had the former action been book account the matter of costs might have been affected by the course taken. P. S. 2034 (G. L. 2312); *Scott v. Niles*, 40 Vt. 573.

In this action the defendant George, under his plea in offset already mentioned, filed a specification in which he included items of account that had accrued before the bringing by him of his action against Hutchins. The court took into consideration such items so far as they went in payment of the plaintiff's charges.

Other items the defendant "claimed" were omitted from his specification in the former action by mistake, and still others "were treated by him" as in offset to items of the plaintiff's specification. Except as above stated the court excluded from consideration the defendant's items in offset, ruling that, as matter of law, the defendant was precluded as to them. To this ruling the defendant excepted. We have no transcript of the case, and we assume, in support of the ruling, that it was based upon such showing or lack of showing or upon such offer or lack of offer of evidence as the case presented. But the bill of exceptions gives us no information in that regard. It informs us only what the defendant claimed and how he treated or regarded the items.

It appears that here were mutual dealings and a running account covering a considerable period of time. One's claim under such an account is, in general, regarded as a single cause of action not to be split up by one suit upon this item, another upon that, and still other suits upon still other items, the suits running on indefinitely according to the course of the mutual dealings back to the beginning of the account. 1 R. C. L. 356, 357.

If the defendant relied upon any exception to the principle announced by the court, he should, at least, have made a definite offer of evidence calculated to take his claim as to the items in question out of the general rule. It does not appear that any such offer was made. On the bill of exceptions brought by the defendant no sufficient reason is shown for disturbing the judgment against him, and accordingly it is,

Affirmed.

NEW YORK CENTRAL RAILROAD COMPANY v. H. G. CLARK AND
TRUSTEE.

February Term, 1918.

Present: WATSON, C. J., HASLTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 17, 1918.

Book Account—Declaration—Practice Act—G. L. 7472—Pleading—Specifications—Jury Trial—Demurrer—Pleadings held Insufficient when Defect is not Pointed Out by Demurrer.

The form for a declaration in book account provided by G. L. 7472, conforms both in letter and in spirit to the requirements of the Practice Act.

A specification may show the defendant how to plead to a complaint, but it cannot itself be pleaded to.

In an action of book account, to recover freight charges, pleas that the plaintiff falsely represented what the proper charges were without disclosing further charges authorized by law, and that there was nothing due plaintiff from defendant and no account or dealings between the parties which were the subject of book account, are bad because they go to the specification and not to the declaration, and do not relieve defendant from liability to account, but are matters for the consideration of the auditor after judgment to account is rendered.

Since a defendant in an action of book account is not entitled to file an answer or plea in bar that goes to the merits of the accounting, or that, if true, depends upon the state of the accounting claimed, he is not entitled to a jury trial on the issue raised thereby.

A demurrer admits only such matters as are well pleaded.

The trial court and Supreme Court have the inherent power to keep unwarranted proceedings from creeping into our practice, which power it is the duty of each court to exercise, and it is consistent with the Practice Act and the Rules of Court that a plea or answer, wholly irrelevant and calculated to distort the course of the law should be held insufficient, although the demurrer thereto does not in terms point out its real character.

BOOK ACCOUNT. Heard on plaintiff's demurrer to defendant's pleas at the April Term, 1917, Windham County, *Waterman*, J., presiding. Judgment, overruling the demurrers and adjudging the pleas sufficient. Plaintiff excepted. The opinion states the case.

William W. Stickney, John G. Sargent and Homer L. Skeels for plaintiff. .

Harvey & Whitney and Hale K. Darling for defendant.

HASELTON, J. This is an action of contract. The defendant filed four pleas by way of an answer. To these pleas severally the plaintiff demurred. The trial court overruled the demurrers, adjudged the defendant's pleas sufficient, and, exceptions being taken, passed the cause to this Court before final judgment. The plaintiff seeks its remedy by an action of book account, using the brief and simple language of the time-honored form provided by statute, a form, which because of its brevity, simplicity and comprehensiveness, conforms both in letter and in spirit to the requirements of the Practice Act. *Blaisdell v. McClary*, 90 Vt. 431, 98 Atl. 1001. The plaintiff filed a specification in which it charges the defendant for a claimed balance for the transportation of freight in cars. There are many items in the specification. Nearly all of the charges are on 20,000 pounds of freight "Brattleboro-Brighton," the freight charges being \$30. Accompanying each charge referred to above is a credit of \$28. Sixteen of the charges are for the same amount of freight each, but the charge in each such instance is \$28, and there is in each such case an accompanying credit of \$30. One charge is \$24 for freight on 16,000 pounds, and the companion credit is \$22.40. That is, in some few cases the credits are more than the items of charge to which they respectively correspond, and in all other instances the items of credit are less than the corresponding debit items.

The defendant's answer is by way of four pleas, so-called. Reduced to a brief statement, such as the Practice Act contemplates, pleas one and two set out that each of the several items of the plaintiff's specification arose out of contracts by which the plaintiff agreed with the defendant to ship specified amounts of live stock from Brattleboro in this State to Brighton station

in Massachusetts; that in each instance the plaintiff falsely and fraudulently represented to the defendant that the rate charged was the proper and legal rate; that the defendant had no knowledge as to the rate or charge for the shipment as fixed by rule, published tariff or any regulation of law, except as it was disclosed to him by the plaintiff; that, however, the plaintiff knew that by some rule, regulation or tariff and by some computation thereunder, an additional rate might be charged the defendant; that, in each instance, as the plaintiff knew, the defendant was shipping a whole or a part of the shipment as agent for others from whom he had collected or was to collect proportionately; that the defendant was persuaded to enter into each such contract of shipment, to make the shipment and to pay therefor according to the contract by the false and fraudulent concealments of the plaintiff. These two pleas of the defendant's answer are substantially the same. The second, however, sets up, in terms, an estoppel. These pleas we shall refer to again, but we here note that they are bad, in that they go to the plaintiff's specification and not to its complaint or declaration. *Currier v. King*, 81 Vt. 285, 289, 69 Atl. 873; *Aseltine v. Perry*, 75 Vt. 208, 210, 54 Atl. 190; *Alexander v. School District*, 62 Vt. 273, 277, 19 Atl. 995; *Lapham v. Briggs*, 27 Vt. 26.

A specification may show a defendant how to plead to the complaint, but a specification cannot itself be pleaded to. "Specifications are the creature of the Court, and are not a part of the record for the purpose of subsequent pleading." And this is emphatically true in an action of book account in view of the well-established character of the action and the duty of the auditor to bring the credit down to the time of the hearing before him. *Porter v. Smith*, 20 Vt. 344; *Delaware v. Staunton*, 8 Vt. 48.

Proceeding in his answer by what he calls pleas three and four, the defendant says that "there is no sum or amount justly due from him to the plaintiff by the plaintiff's original book," and that "there is not and never has been any account or subject of account or book account between the plaintiff and the defendant," that "the plaintiff has not and never has had any account or book account with or against the defendant," and that "there has never been between the plaintiff and the defendant any account for transactions, contracts or matters of deals of any sort which were the subject or basis for any account or book

account." All these matters set forth by the defendant in his answer by pleas three and four go to the merits of the plaintiff's claim in his action on book, as do also the matters set out in pleas one and two which go to the specification. All these matters are for the consideration of an auditor after judgment to account is rendered. Our cases illustrate the kinds of defence that may be made in bar of an accounting. Such a defence is the permanent disability of the plaintiff to maintain such an action. *Library Bureau v. Hooker*, 84 Vt. 530, 80 Atl. 660. See also *Metcalf v. Metcalf's Estate*, 89 Vt. 63, 94 Atl. 1, where the marital relation between the plaintiff and the deceased Metcalf, during the time when the account was claimed to have accrued, was relied on, though in vain, as a bar to an accounting on book. See further *Hunneman v. Fire District*, 37 Vt. 40, where it is held that if a defendant, sued as a corporation, would deny its corporate existence, such defence should be raised before judgment to account is rendered.

The defendant throughout his brief seems to take the position that because some matters may be pleaded in bar of any accounting, anything in bar may be so pleaded, and a jury trial demanded on the issue so formed. But an answer or plea in bar that goes to the merits of the claim for an accounting, or that, if true, depends upon the state of the accounting claimed, does not entitle a defendant to a jury trial; in fact a defendant is not entitled to file such an answer to a claim to an accounting on book. The defences of payment, nothing due, no dealings, settlement, accord and satisfaction, and all defences which involve a consideration of the merits of the claim made, all such defences as are here made, must go before the auditor, and before the auditor and on consideration of the auditor's report all the rights of the defendant are protected, as appears from our statutory provisions and our cases.

That no part of the defendant's answer relieves him from liability to account appears from the following cases: *Blaisdell v. McClary*, 90 Vt. 431, 98 Atl. 1001; *Library Bureau v. Hooker*, 84 Vt. 530, 537, 80 Atl. 660; *Davis v. Farwell*, 80 Vt. 166, 170, 67 Atl. 129; *Hogan v. Sullivan*, 79 Vt. 36, 64 Atl. 234; *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366; *Smith v. Bradley*, 39 Vt. 366; *Matthews v. Tower*, 39 Vt. 433; *Sargeant v. Sunderland*, 21 Vt. 284; *Porter v. Smith*, 20 Vt. 344; *Hagar v. Stone*, 20 Vt. 106.

In an action of book account "the right to plead (or answer) in bar is as limited as the right to defend before the auditor is extended." *Steele, J.*, in *Smith v. Bradley*, 39 Vt. 366, 369. The most thorough discussion of the nature and incidents of the action of book account, to be found in our reports, is the opinion in *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366. Therein, Judge Thompson, referring to the rule laid down as above by Judge Steele, says: "This has ever been the rule in this State. This has in effect absolutely precluded the forming of an issue on the merits of the plaintiff's account."

The defendant in his brief speaks of the things which the plaintiff's demurrers admit. But demurrers admit only what is well pleaded, and here nothing is well pleaded by the defendant. *Matthews v. Tower*, 39 Vt. 433, 440.

The defendant says that the plaintiff's demurrers to pleas one and two are bad because the grounds therefor as specified set up matters of fact, that is, that they are speaking demurrers. If we assume that this is so, the fact remains that, with all such stated grounds struck out or disregarded, there are left demurrers to the pleas in question, and the trial court was bound to notice grounds of demurrer not pointed out that vitally affect the integrity of our judicial system. Rule 14 of this Court says that where, as here, a demurrant is the excepting party, he will not, without leave, be heard upon any cause of demurrer not shown by the bill of exceptions to have been specially pointed out on the hearing below. This means that there may be grounds of demurrer so fundamental that this Court will consider them, and may hear counsel thereon, although such grounds were not pointed out below; and this rule is not inconsistent with the Practice Act, for while that provides that a demurrer shall distinctly specify the reason why the pleading demurred to is insufficient, there is nothing in the act to prevent the court from noticing and holding insufficient a plea or answer, wholly irrelevant and calculated to distort the course of the law, merely because the demurrer does not in terms point out the real character of the plea. The trial court and this Court have the inherent power to keep unwarranted proceedings from creeping into our practice, and such power it is the duty of each court to exercise. *Lee v. Follansby*, 83 Vt. 35, 43, 74 Atl. 327, 138 Am. St. Rep. 1061; *Powers v. Rutland R. R. Co.*, 83 Vt. 415, 76 Atl.

110. Much of the discussion in the briefs of counsel on both sides relates to matters not now before us, and such matters we refrain from here discussing.

Judgment on the pleadings reversed, and cause remanded that judgment to account may be rendered.

GILBO & SWARTZ v. ANNA S. MERRILL'S ESTATE.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, JJ.

Opinion filed May 17, 1918.

*Contracts—Construction—Guaranty of Efficiency of Machinery
—Findings of Fact—Exceptions—When Not Sustained.*

A guaranty of efficiency in a contract for the installation of a wind-mill and water system according to certain specifications, is no more than a guaranty of such efficiency as the work properly carried out in accordance with the specifications would afford. An exception to a finding of fact which there is some evidence to support, will not be sustained.

APPEAL from the disallowance of plaintiffs' claim by commissioners on the defendant estate. Plea, the general issue. Trial by court at the September Term, 1915, Chittenden County, Miles, J., presiding. Judgment, on facts found by the court, for defendant. Plaintiffs excepted. The opinion states the case.

Max L. Powell for plaintiffs.

V. A. Bullard and *Sherman R. Moulton* for defendant.

HASELTON, J. This is an appeal to the county court from the disallowance by the commissioners on the estate of Anna S. Merrill of the plaintiffs' claim. In county court the case was tried on a declaration in assumpsit in the common counts. The

plea was the general issue. The trial was by the court, and on findings made judgment was rendered for the defendant. The plaintiffs bring a bill of exceptions.

The plaintiffs are successors to Gilbo & Tobin, who contracted with Anna S. Merrill and her husband, James A. Merrill, to install on the Merrill farm in Addison, on the shore of Lake Champlain, a water system comprising a windmill, a tank and tank house, a pipe leading from the lake to the windmill, a pipe leading from the windmill to the tank, and other pipes. Gilbo & Tobin and Gilbo & Swartz, who have been treated throughout as standing in the shoes of Gilbo & Tobin, will herein be spoken of indifferently as the plaintiffs. Following the language of the bill of exceptions, the word "defendant" is herein used to designate the intestate, her husband, a party to the contract, her estate or her administrator as the sense may require. No confusion can result.

The defence on trial was by way of recoupment and the claim of nonacceptance. The contract was not fully performed by the plaintiffs within the time specified in the contract in certain respects as found and designated by the court. Sometime after the expiration of the period fixed for the completion of the contract the defendant caused a letter to be written to the plaintiffs pointing out certain failures to perform, and stating that the things left undone must be done by a day named or the defendant would proceed to do them and charge the plaintiffs therefor. No one appearing in answer to the letter, the defendant undertook the completion of the work, and in doing so paid out various sums. Thereafter the defendant commenced to operate the plant, and because of inefficient or improper construction the windmill fell and the defendant was obliged to expend a sum named to repair it. The court finds that the plant, from the commencement of its use until the defendant sold the premises on which it stood, never operated in a satisfactory and efficient manner; that it was at no time an efficient working windmill water plant; and that the main trouble with it lay in the size of the pipe from the windmill to the tank or in the intake pipe. The court finds that the pipe from the windmill to the tank was too small for the intake pipe. There is expressed an inability to find out how much it would have cost to correct this defect, which is treated as chargeable to the plaintiffs, but there is a finding that in addition to making the repairs referred to, the defendant

was obliged to purchase a gasoline engine costing fifty-one dollars in order to make this windmill plant constantly available. The contract price for the plant agreed upon was something over eight hundred dollars. The defendant had paid the plaintiffs four hundred dollars on account, and claimed to have been damaged through the default of the plaintiffs under the contract to an amount more than the balance unpaid under the terms of the contract. On its findings and failures to find the court rendered judgment for the defendant as stated at the outset.

The finding which the court makes the main cause of damages to the defendant is, as already appears, the finding as to the size of the pipes. The pipes were, however, of the precise size fixed by the contract, and the plaintiffs took an exception on this ground. The force of the claim under this exception the defendant attempts to meet by pointing out, what is true, that the contract contained this clause, "The efficiency and the operation of the plant is guaranteed," and by calling attention to the finding that the plant was not efficient. But the contractors were nevertheless bound to follow the specifications, and the guaranty of efficiency was no more than a guaranty of such efficiency as the work properly carried out in accordance with the specifications would afford. *Bush v. Jones*, 144 Fed. 942, 75 C. C. A. 582, 6 L. R. A. (N. S.) 774; *MacKnight & Co. v. Mayor & Co.*, 160 N. Y. 72, 54 N. E. 661, 6 R. C. L. 866. There are in the case no findings that reach back of the contract and make the plaintiffs responsible to the defendant on account of its terms and specifications. So in regard to this fundamental basis of the judgment very substantial error intervened.

The court found that the contract was not complied with because the floor of the tank house within its walls, the floor upon which the tank rested, was of an unstable character. The plaintiffs excepted to this finding and also to the finding already mentioned that the windmill accident was due to improper construction. These two exceptions the plaintiffs brief. But there was some evidence to support such finding, and as to the tank floor, windmill and some other matters, there were no specifications which prevented the full operation of the undertaking for the construction of an efficient plant.

Some exceptions to the exclusion of evidence were taken, but the evidence shut out against exception was properly excluded, either because of remoteness or because its admissibility

under the plaintiffs' specification—was not made to appear. Some questions that might naturally have arisen in the trial of the case are not presented by the bill of exceptions.

Judgment reversed and cause remanded.

GLOBE GRANITE COMPANY v. CHARLES CLEMENTS.

October Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 17, 1918.

Trial—Referee's Report—Pleadings—Amendments—Powers of Trial Court—Practice Act—Plea in Offset—Amendment—Sales—Warranty—Evidence—Value—Contracts—Express Warranty—Construction—Enforcement of Right of Action for Breach of Warranty—Final Judgment.

On hearing on a referee's report, in which the transcript is referred to, the trial court has a right to avail itself of the transcript, and the general right to inquire *dehors* the record, in ascertaining whether an amendment to a plea in offset should be allowed.

Where a claim in offset is not designated as for a breach of warranty, but is treated as such on the trial before a referee, it is not error, on hearing upon the referee's report, to allow an amendment to the plea in offset which averred a breach of warranty.

When a cause is referred, the pleadings are to be treated as adapted to the facts found, when no new cause of action is thereby brought in, and the formal pleadings may be treated as amended or may be actually amended before judgment.

Under the Practice Act, as well as under the cases decided prior to its taking effect, a plea in offset in the common counts may be amended by adding thereto a count for breach of warranty, without introducing a new cause of action.

In the absence of a showing to the contrary, the price paid for a granite monument may properly be taken as evidence of its value, if it had been as warranted, and the cost of making it as warranted is

evidence tending to show how much its actual value fell short of the value of the warranted monument.

That a contract is by way of an undertaking to comply with a written order is immaterial on the question whether such contract contains an express warranty.

Where a contract is evidenced by a written instrument, the question whether it embodies an express warranty is one of construction for the court.

A positive provision in a contract for the manufacture and sale of a granite monument that such monument should be sound and free from cracks is an express warranty against specific defects.

The breach of an express and absolute warranty contained in a contract for the manufacture and sale of an article, gives rise to a right of action which can be asserted in an independent suit by the vendee, or pleaded in offset to any action founded upon contract, brought by the vendor against him, by proving the warranty and the breach without more.

Where the report of a referee furnishes the necessary basis for a judgment adjusting the entire controversy, no remand is required but final judgment will be rendered in Supreme Court.

ASSUMPSIT in the common counts. Plea in offset. Heard on the report of a referee at the March Term, 1917, Washington County, *Wilson, J.*, presiding. Judgment for plaintiff. Both parties excepted. The opinion states the case.

Theriault & Hunt for plaintiff.

John W. Gordon for defendant.

HASELTON, J. This is an action of contract, in the form of general assumpsit. The plaintiff filed a specification, of a skeleton character, referring to various contracts for monuments, and claiming a balance of \$449. The defendant, among other pleas, filed a plea in offset in the general counts in assumpsit, and the cause was referred. Before the referee the defendant filed a specification under his plea in offset. This specification was also of a skeleton character. It contained a claim with reference to a certain contract 39888 so called, not one of the contracts to which the plaintiff's specification related. On hearing before the referee, the plaintiff's specification was con-

ceded to be correct, and the entire controversy was over the defendants' claim in offset with reference to contract 39888, which was a contract for a granite monument. The defendant ordered this monument of the plaintiff, and the order specified that it should be from sound stock and free from cracks. The plaintiff accepted the order and constructed and forwarded the monument. Before the defendant had opportunity to inspect the monument he, at the request of the plaintiff, sent a check in payment therefor. In a letter accompanying the check the defendant said that the check was sent with the understanding that the work was according to agreement.

The defendant was a dealer in monuments, and sold the work in question to Williams and Bowers of Cortland, New York, who procured it for a customer there, one Rowley. The monument was set up in a cemetery, and afterwards, when lettering was being done, a crack was discovered upon the die, extending across the lettering. This crack had until then been invisible to and undetected by any one who had inspected the monument or had to do with setting it up. The crack in fact existed in the die when the stone was shipped by the plaintiff. It was caused by a blast when the stone was quarried.

There is no room for doubt, on the facts reported, that, in view of the nature of the work as a monument to the dead, the crack constituted a substantial defect, and rendered the die worthless for the purpose for which it had been furnished. Williams and Bowers had given their note to the defendant in payment for the monument, but on account of the defect refused payment of the note. The defendant insisted that the plaintiff furnish a new die, but the plaintiff claimed that the die already furnished complied with the contract and was perfect, and refused to replace it, and never consented that it should be replaced at its expense. Finally the defendant replaced the die at an expense of \$340.26. The referee reported to the court in the alternative, making the amount recoverable by the plaintiff to depend upon the allowance of the above sum as an offset to the balance otherwise due the plaintiff.

At the hearing on the referee's report, and before judgment, the defendant obtained leave of court to file and did file an amendment to his plea in offset by adding thereto averments of an express warranty in the contract in question, and of a breach of such warranty in consequence of the crack in the die by rea-

son of which the plaintiff was damaged to the amount of the offset conditionally reported by the referee. To the action of the court in allowing this amendment the plaintiff objected and excepted on the ground that the amendment "introduced a new and different cause of action and claim in offset, distinct from and inconsistent with the claim in offset tried before the referee."

The transcript was referred to, and the court had a right to avail itself of that in determining whether the amendment offered was allowable, and had a general right to inquire *dehors* the record to ascertain the real counterclaim sought to be established by the plea in offset; and we think that the ruling of the court allowing the amendment should be sustained. From the transcript it appeared that, while the defendant had nowhere designated his claim in offset as for a breach of warranty, he had, practically at the outset, stated his claim in such a way that the plaintiff recognized its character, and twice applied to it its technical name. The court had ample ground for the finding which it impliedly made that the right to an offset for a breach of warranty was tried out before the referee, and was in effect the counterclaim of which the defendant sought to avail himself by pleading in offset in the common counts in assumpsit.

When a cause is referred, the pleadings are to be treated as adapted to the facts found when no new cause of action is thereby brought in, and the formal pleadings may be treated as amended or, as here, may be actually amended accordingly before judgment. *McDonald v. Place*, 88 Vt. 80, 85, 90 Atl. 948; *Camp v. Barker*, 87 Vt. 235, 237, 238, 88 Atl. 812, Ann. Cas. 1917 A, 451; *Van Dyke v. Grand Trunk Ry. Co.*, 84 Vt. 212, 78 Atl. 958, Ann. Cas. 1913 A, 640; *Gordon's Admr. v. Hotchkiss*, 82 Vt. 479, 74 Atl. 74. The plaintiff argues, in effect, that, as assumpsit in the common counts will not lie for a breach of warranty, the amendment to the defendant's counterclaim necessarily brought in a new cause of action. But our best-considered cases prior to the Practice Act indicate that this claim is unfounded, show that a special count may be for the same cause of action as a general or common count. *Patterson's Admr. v. Modern Woodmen of America*, 89 Vt. 305, 95 Atl. 692; *Lamb v. Zundell*, 78 Vt. 232, 62 Atl. 33; *Lyndon Granite Co. v. Farrar*, 53 Vt. 585; *Dana v. McClure*, 39 Vt. 197. And under the Practice Act the fallacy of the plaintiff's claim in the respect under consideration is obvious.

On the question of the scope of the real issue tried by the referee the plaintiff calls attention to the fact that the amount found conditionally for the defendant was simply the cost of replacing the cracked die, and says that from this it appears that no issue of breach of warranty was made, since in that case the damages must have been the difference between the value of the monument as it was and the value it would have had, if it had been as warranted. Let it be assumed that this general rule applies to a case of this sort. Nevertheless, in the absence of a showing to the contrary, the price paid for the monument might properly have been taken as evidence of its value had it been as warranted, and then the cost of making it as warranted would be evidence tending to show how much its actual value fell short of the value of the warranted monument. *Houghton v. Carpenter*, 40 Vt. 588, 596; *Melby v. Osborne*, 33 Minn. 492, 24 N. W. 253; *Wheeler, etc., Mfg. Co. v. Thompson*, 33 Kan. 491, 6 Pac. 902; *Showen v. Owens Co.*, 182 Mich. 264, 148 N. W. 666.

With the claim of an express warranty in the case as a claim in offset, the court disallowed the claimed offset and rendered judgment for the plaintiff to recover the larger sum reported by the referee. To this judgment the defendant excepted on the ground that the offset should have been allowed and judgment rendered for the smaller sum reported. Under this exception the substantial question raised and argued is whether there was in the contract in question an express warranty surviving such acceptance as the report here shows. That the contract was by way of an undertaking to comply with a written order is here immaterial. And, since the instrument evidencing the contract is in writing, the question of whether it embodied an express warranty is one of construction for the court. *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; *Unadilla Silo Co. v. Hull*, 90 Vt. 134, 96 Atl. 535. Now, considering the subject-matter of this contract, it cannot be said that the positive provision that the monument should be sound and free from cracks was merely descriptive of the kind of a monument to be furnished. This positive provision was an express warranty against specific defects, as much so as a sale of a horse with a positive representation that it is without a spavin, embodies an express warranty that the horse is without such unsoundness. *Hobart v. Young*, *supra*; *Franklin & Co. v. Lamson & Co.*, 189 Mass. 344, 75 N. E. 624; *Unadilla Silo Co. v. Hull*, *supra*. Since here was an express warranty, the discussion

by counsel of an implied warranty, its character and incidents, need not be noticed. And since the warranty was express and absolute, the defendant had a right of action which he could assert in an independent suit, or by way of offset to any action founded on contract brought against him by the plaintiff, by proving the warranty and the breach, without more. *Hobart v. Young*, *supra*; *Pennock v. Stygles*, 54 Vt. 226; *Richardson v. Grandy*, 49 Vt. 22; *Pinney v. Andrews*, 41 Vt. 631, G. L. 1806.

The offset should have been allowed, but the case requires no remand. The referee's report furnishes the necessary basis for a judgment adjusting the entire controversy here, such judgment as the trial court should have rendered by way of giving effect to the salutary principles underlying the whole law of offsets. *Stewart v. Knight*, 83 Vt. 201, 203, 75 Atl. 12. As the plaintiff points out, had judgment been rendered for the plaintiff for the smaller sum reported by the referee, interest thereon should have been brought down to the date of the judgment, which was August 3, 1917, making the amount that the plaintiff was entitled to recover as of that date \$176.09.

Judgment for the larger sum reported reversed, and judgment for the plaintiff to recover, as of August 3, 1917, the sum of \$176.09 with costs below. Let the defendant's costs in this court be deducted.

WESLEY G. WHITE v. IRA G. THORP, TRUSTEE IN BANKRUPTCY OF
THE ESTATE OF W. L. WHITE, AND W. L. WHITE.

May Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed May 29, 1918.

Appeal in Chancery—Final Order—Execution.

An order that execution issue to enforce a decree in chancery is not a final order from which an appeal lies.

PETITION FOR FORECLOSURE of a real estate mortgage. Heard on report of a special master in vacation after the March Term,

1917, Chittenden County, *Waterman*, Chancellor. Decree for plaintiff, adjudging a certain sum due from defendant Thorp as mesne profits. From an order issuing an execution against him for the amount found due, defendant Thorp asked and was granted leave to appeal. Heard in Supreme Court on plaintiff's motion to dismiss the appeal.

Edmund C. Mower and Charles H. Darling for plaintiff.

V. A. Bullard and Sherman R. Moulton for defendant Thorp.

PER CURIAM. The motion heard is to dismiss an appeal in chancery. The decree was rendered on May 22, 1917, and filed two days later. Thereby a certain sum of money was ordered, adjudged, and decreed to be paid by defendant Thorp to the plaintiff. No appeal was taken therefrom. On July 30, 1917, the chancellor, on petition of the plaintiff, ordered that execution issue against the chattels and lands of defendant Thorp, and for want thereof against his body, for the amount due the plaintiff under the decree, according to the prayer of said petition. The order was filed August 6, 1917, and on the same day a motion was filed by Thorp, praying "for an appeal from the order and decree * * * granting an execution against him in said cause."

The plaintiff moves that the appeal be dismissed, for that the order from which it was taken is not a final decree. The motion must be sustained. The order that execution issue was not a decree. It was made under the statute as a method of enforcing the performance of the decree previously rendered. P. S. 1302. See *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742; *Vilas v. Burton*, 27 Vt. 56.

Appeal dismissed.

FIDELITY & DEPOSIT COMPANY v. JOSEPH G. BROWN, INSURANCE COMMISSIONER.

May Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed June 12, 1918.

Legislative Enactment—Intent of Legislature—Words and Phrases —“Similar” — Foreign Corporations—Conditions and Regulations—G. L. 5623—Foreign Insurance Companies—License Fees—Insurance Commissioner.

The legislative history of an enactment may be referred to for aid in arriving at the intent and purpose of the Legislature as expressed in the act.

The word “similar” has not the significance of “the same,” identical but is defined as “nearly corresponding; resembling in many respects; somewhat alike; having a general likeness.”

in permitting foreign corporations to do business in this State, the permission may be granted under such conditions and regulations as the State may impose, not thereby affecting matters of a federal nature.

Under G. L. 5623, providing that, if another state or country imposes upon a domestic insurance company doing business therein fees, etc., exceeding those imposed by this State upon foreign insurance companies doing business herein, an insurance company, organized under the laws of such other state or country doing business in this State shall be subject to fees, etc., similar to those imposed in such other state, such fees, etc., so required shall correspond in amount to the fees, etc., imposed by such other state or country upon an insurance company of the same classification, incorporated in this State, doing business in such other state or country; and therefore the insurance commissioner is not authorized to collect from a foreign insurance company, not doing life insurance business, the same fees imposed by the state under whose laws such company was organized upon a life insurance company organized under the laws of this State, the two companies not being of the same classification.

APPEAL IN CHANCERY, Washington County. Heard in Chambers, February 6, 1918, on defendant's demurrer, *Slack*, Chancellor. Decree sustaining the demurrer and dismissing the bill with costs. The plaintiff appealed.

Theriault & Hunt for the plaintiff.

Herbert G. Barber, Attorney General, for the defendant.

STATEMENT BY WATSON, C. J. The bill alleges that by the Code of Public General Laws of the State of Maryland, of 1904, Article 23, Section 167, as amended by the General Assembly of that state in 1912 (Laws 1912, c. 207) it is provided:

"No person, firm or corporation shall act as agent or solicitor in this state for any insurance company * * * * except for such companies as may be chartered under the laws of this state, in any manner whatever relating to insurance risks, until all the provisions of this article relating thereto have been complied with, and there has been granted by the insurance commissioner a certificate of authority or license, for which said company * * * * or their agent, doing a life insurance business, shall pay to the insurance commissioner the sum of three hundred dollars, * * * * provided that nothing contained herein shall amend or repeal sections 170 to 174, both inclusive, of article 23 of the Code of Public General Laws of 1904."

That said section 174 reads as follows:

"No license fee shall be hereafter required of or collected from any company, corporation or association chartered, incorporated or organized under the laws of any of the States of the United States other than the State of Maryland, * * * * as a condition of granting to such company, corporation or association a license to carry on any of the classes of insurance business known as surety, liability, fidelity, accident, boiler, plate glass, health, burglary, sprinkle leakage, credit indemnity, or casualty insurance; * * * *"

It is further alleged that for many years last past the plaintiff has been engaged in carrying on its authorized insurance business in the State of Vermont, and has established a large number of agencies therein for such purpose, doing a large business each year, under a license granted to it according to the law of the State, and on April 1, 1917, a renewal of such license to do

business in the State until April 1, 1918, was granted the plaintiff, it paying to the State for such renewal the sum of five dollars, as required by law.

Also that under and by virtue of the provisions of said section 167, the State of Maryland imposes upon and requires of the National Life Insurance Company, a Vermont insurance company doing a life insurance business in said State of Maryland, a fee of three hundred dollars; that the plaintiff, in its business, either in this State or elsewhere, in no manner whatever engages in life insurance business, but wholly in the classes of insurance business specified in said section 174; that the defendant, as insurance commissioner of Vermont, by reason of the requirement by the State of Maryland of said fee from said National Life Insurance Company, as stated above, and claiming authority and right therefor under and by virtue of section 4824 of the Public Statutes, (G. L. 5623,) has imposed upon, required of, and attempted to enforce against the plaintiff, as a fee for doing its said business in this State, the sum of three hundred dollars, and still continues so to do, and therein has demanded of the plaintiff the payment of the additional sum of two hundred and ninety-five dollars as such fee, and has threatened, and still threatens, to revoke and cancel the said license of the plaintiff unless such additional sum is paid; that unless the defendant is restrained from carrying his said threats into effect, the plaintiff's said license will be cancelled and revoked without any remedy or redress to the plaintiff in the premises, and thereby the plaintiff will suffer great and irreparable damage, etc.

The prayer is for a perpetual injunction restraining the defendant from revoking or cancelling the plaintiff's said license, and from further imposing upon, requiring of, and attempting to enforce against the plaintiff, any additional fee for doing its said business in this State, for the cause aforesaid, and for general relief. A temporary injunction was issued against the defendant, to be in force until further order of court.

The defendant filed his answer, and therein incorporated a demurrer to the bill, assigning as a cause the want of equity. The printed case shows that the parties then stipulated that the cause, in so far as the claims, briefs, and arguments of the parties are concerned, shall stand for the decision of the court wholly upon the construction of section 4824 of the Public

Statutes; that until the final determination of the cause, the defendant, for or by reason of any claim based upon that section of the statute, shall in no way interfere or attempt to interfere with the carrying on of business in this State, but upon the payment by the plaintiff annually of the fee of five dollars, shall renew the license of the plaintiff, as of April 1, so to do business in this State; and that if, upon the final determination of the cause, the Supreme Court shall hold that the fee should be held to have been three hundred dollars, then the plaintiff shall pay the same to the State of Vermont without further demur.

The demurrer, being heard solely on the question whether, on the facts alleged, the provisions of section 4824 of the Public Statutes authorizes the insurance commissioner to collect a fee of three hundred dollars from the plaintiff for doing business in this State, was sustained, the bill adjudged insufficient and dismissed with costs to the defendant, the temporary injunction to continue in force pending the appeal taken by the plaintiff.

WATSON, C. J. The only question presented is as to the construction of section 4824 of the Public Statutes, now section 5623 of the General Laws, which reads:

"If another state or country imposes upon or requires of a domestic insurance company or its agents doing business therein, fees, fines, penalties, deposits, obligations or prohibitions exceeding those imposed by this State upon or required of foreign insurance companies doing business herein, an insurance company organized under the laws of such other state or country and its agents doing business in this State shall be subject to the fees, fines, penalties, deposits, obligations or prohibitions similar to those so imposed in such other state or country; * * * *"

The plaintiff claims that if this section of the statute is to stand, it must be construed as applicable in its retaliatory operation, not to insurance companies generally, regardless of the lines of business in which they are engaged, but to insurance companies doing like lines of business; in other words, that the retaliatory operation must be according to classification. While the defendant claims that the true intent and purpose of the General Assembly was to make the maximum fee, etc., imposed upon any Vermont insurance company by an other state, the fee, etc., to be imposed upon all insurance companies of the same state, doing business in Vermont.

The law of this section was first enacted as No. 115 of the Acts of 1888. The legislative history of this enactment may be referred to for aid in arriving at the intent and purpose of the lawmakers as expressed in the Act. *Town School Dist. of Brattleboro v. School Dist. No. 2*, 72 Vt. 451, 48 Atl. 697; *Lapina v. Williams*, 232 U. S. 78, 34 Sup. Ct. 196, 58 L. ed. 515. The original bill, as introduced, had reference to life insurance companies only; and the fees, etc., to be imposed upon or required of a foreign life insurance company and its agents while doing business in this State, were "the same" as were imposed upon or required of a domestic life insurance company while doing business in the state or country under whose laws such foreign life insurance company was created, in case they be more in amount or at a greater rate than those required by other provisions of law of this State. By amendments the bill, as it became a law, had reference to "any insurance company," and the fees, etc., to be imposed upon or required of any insurance company coming from another state or country, and its agents, doing business in this State, were fixed as "similar" to those imposed in such other state or country upon any domestic insurance company, while doing business therein, in case, etc.

It is matter of common knowledge that there are several general classes of insurance. The word "similar" is defined (Webster's Internat. Dict.) as "nearly corresponding; resembling in many respects; somewhat alike; having a general likeness." It is to be noticed that as thus defined, it has not the significance of "the same," identical. The statute under consideration contemplates reciprocal relations founded upon consent which is implied from comity between the states and the absence of prohibition. In permitting foreign corporations to do business in this State, the permission may be granted under such conditions and regulations as the State shall impose, not thereby affecting matters of a federal nature. *Cook v. Howland*, 74 Vt. 393, 52 Atl. 973, 59 L. R. A. 338, 93 Am. St. Rep. 912. The license, and renewals thereof, granted to the plaintiff prior to the bringing of this bill, were under the provisions of P. S. 4764 (now G. L. 5554), for each of which, extending until the first day of April thereafter, the company was required to pay the insurance commissioner five dollars. The excess of this sum can be collected of the plaintiff only under the provisions of the retaliatory statute in question. It seems pretty clearly to have been the in-

tention of the Legislature, when this statute is applicable, to return like for like—to treat an insurance company coming from another state or country, to do business here, the same as such a company from this State is treated in such other state or country, while doing business there. So long as the provisions of the original bill related solely to life insurance companies, the amount of the fees, etc., was aptly fixed as “the same.” And yet it was fixed by classification, for no two insurance companies even of the same class are identical, they have but a general likeness, and are therefore only similar. Were the law in terms to impose the same fees, etc., upon “similar insurance companies,” there should seem to be no doubt as to the meaning intended; and yet, as the law was passed, and as it now is, broad enough to bring within its provisions all insurance companies, we think the same idea of classification obviously flows out of the nature of the purpose to be accomplished, and that the word “similar,” in the connection of its use, carries with it this basic idea, and that such was the intention.

Therefore, by the law of the section of the statute in question, when applicable, the fees, etc., which shall be imposed upon or required of an insurance company organized under the laws of another state or country and its agents doing business in this State, shall correspond in amount to the fees, etc., imposed by such other state or country upon an insurance company of the same classification, incorporated in this State, or its agents, doing business in such other state or country.

According to the allegations in the bill, the plaintiff is not of the same classification as the National Life Insurance Company of this State, and is nowhere engaged in doing life insurance business. It is engaged exclusively in the classes of insurance business specified in section 174 of the Maryland statute set forth in the statement of the case; and the law of that section is that no license fee shall be required of or collected from any insurance company, corporation or association chartered, incorporated or organized under the laws of any other state of the Union, as a condition of granting to such company, corporation or association, a license to carry on any of the classes of insurance business specified therein. It follows that the insurance commissioner is not authorized by the provisions of section 4824 of the Public Statutes (G. L. 5623) to collect from the plaintiff the additional fee demanded of it for doing business in this State.

Decree reversed, demurrer overruled, bill adjudged sufficient, and cause remanded.

EMMA RAYMOND v. CAROLINE E. SHELDON'S EST.

May Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed June 21, 1918.

Implied Contract—Services Rendered—Question for the Jury—Evidence—Motion for Verdict—Appeal from Commissioners—Estate of Deceased Person—Witness—Error—Finding of Trial Court—Unanswered Question—Discretion of Trial Court.

An implied contract to pay for services rendered must contain all the elements of an express contract and differs from the latter only in its proof, each depending upon questions of fact.

In an action to recover upon an implied contract to pay for services, if there is any substantial evidence fairly and reasonably tending to establish such contract, the question is for the jury.

In reviewing the denial of defendant's motion for a directed verdict, the evidence must be viewed in the light most favorable for plaintiff.

Where, in an appeal from commissioners on the estate of a deceased person, plaintiff's evidence tended to show that she performed valuable services for the deceased, at the latter's request, the question whether there was an implied promise on the part of the deceased to pay plaintiff what her services were reasonably worth, was for the jury.

In an appeal from commissioners upon the estate of a deceased person, wherein plaintiff sought to recover upon an implied contract by deceased to pay for her services, where a witness called by plaintiff testified without objection that she had seen plaintiff go to the home of deceased, it was not error to allow the witness to say how frequently she had seen this occurrence.

In such case, it was not error to allow the same witness, after testifying without objection that she had seen articles which the deceased told her had been purchased for deceased by plaintiff, to say what those articles were.

In such case, it was not error to allow a witness to testify as to the nature of purchases made by plaintiff, delivered either to plaintiff or deceased and charged to and paid for by deceased, and the frequency with which plaintiff came to the store.

The finding of the trial court that a witness is qualified to testify as to a fair and reasonable price for services of a certain nature is not revisable, there being some evidence of qualification.

An exception to an unanswered question is not available.

A motion to set aside a verdict as being excessive is addressed to the sound discretion of the trial court, and is not reviewable unless it appears that the court refused or failed to exercise its discretion or abused it.

ACTION OF CONTRACT. Plea, the general issue. Trial by jury at the September Term, 1917, Rutland County, *Wilson, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion states the case.

Marville C. Webber for the defendant.

Lawrence, Lawrence & Stafford and *Edwin C. Lockwood* for the plaintiff.

MILES, J. This case came to the county court on an appeal by the plaintiff from the disallowance of her claim against the estate of Caroline E. Sheldon, and it comes here upon the defendant's exception to the refusal of the trial court to direct a verdict in its favor, to the reception of certain evidence, and to certain portions of the court's charge.

The ground of the exception to the court's refusal to direct a verdict in the defendant's favor is that there was no evidence in the case tending to prove a promise implied in fact on the part of Mrs. Sheldon. It is true as argued by the defendant, that the implied contract, such as here under consideration, must contain all the elements of an express contract, and that it only differs from an express contract in its proof. 6 R. C. L. 587, par. 6. Each depends upon questions of fact, and if there is any

substantial evidence fairly and reasonably tending to establish such contract, that question must be submitted to the jury. *Fitzsimons v. Richardson*, 86 Vt. 229, 84 Atl. 811; *McGaffey v. Mathie*, 68 Vt. 403, 35 Atl. 334; *Kelton v. Leonard*, 54 Vt. 230.

In reviewing the denial of defendant's motion for a directed verdict, the evidence must be viewed in the light most favorable to the plaintiff. *Hazen v. Rutland R. R.*, 89 Vt. 94, 94 Atl. 296. Applying these well-established rules to what appears in this case, we examine the evidence to see if it reasonably and fairly tends to show an implied promise on the part of Mrs. Sheldon to pay the plaintiff what her services were reasonably worth, and from that examination we think it does so show.

The evidence of one witness was to the effect that during the time covered by the plaintiff's bill against Mrs. Sheldon's estate, the witness had on frequent occasions received requests over the telephone from the Sheldon house, to ask the plaintiff to call there; that when the witness was at work for Mrs. Sheldon, the plaintiff would call there and Mrs. Sheldon would ask her on those occasions, why she, the plaintiff, had not called, stating to the plaintiff that she wanted her to do something for her; that she knew of the plaintiff's bringing to Mrs. Sheldon articles purchased at the store for her; that at one time Mrs. Sheldon said to the witness that she could not pay the plaintiff for what she had done for her. There was other similar evidence in the case which had a tendency to prove that the plaintiff's services were performed at the request of Mrs. Sheldon. This was enough to entitle the plaintiff to go to the jury if the services were valuable. It is said in 40 Cyc. 2810: "Where valuable services are rendered, or material furnished, by one person for another at the latter's request, in the absence of circumstances showing that the services or material were intended to be rendered or furnished gratuitously, the former is entitled to recover for such services or material, although there was no express contract for remuneration."

To the same effect is 6 R. C. L. 587, par. 6. Indeed such contracts are of daily occurrence, and no question is made as to their legal and binding force.

An examination of the transcript discloses that the evidence tended to show that the services were valuable; that the plaintiff did washings weekly and special washings twice a year for Mrs. Sheldon; that the washings were not the general washings, but

the washings of such things as Mrs. Sheldon's wearing apparel, her bureau covers, towels, napkins and blankets. There was no error in overruling the motion for a directed verdict.

The exception to the charge raises the same question that is raised by the motion for a verdict, and the disposition of that question makes it unnecessary to consider the exception to the charge.

The defendant excepts to a question asked Georgia Davis, which was received subject to the objection that it had no tendency to prove either a contract or service, and an exception was noted for the defendant. The witness had testified without objection that she had seen the plaintiff go into Mrs. Sheldon's house, and to the question, "How frequently" answered, "Very frequently, perhaps every day with the exception of Sunday." This evidence was material to show that the plaintiff went to Mrs. Sheldon's house where it was claimed that much of the services of the plaintiff were performed, and where the plaintiff claimed she went for direction in regard to the errands. The evidence was properly received.

The defendant objected to another question asked this witness upon the same grounds as those stated to the other question. The witness had testified without objection that she had seen a number of things which Mrs. Sheldon told her the plaintiff had purchased for her, and the question objected to was as follows: "What were those articles, do you recall?" The answer was: "I remember postal cards, and the gifts she gave the children, and some little lace and ribbons; that is all I can recall now." The evidence had a bearing upon the extent of the services performed in the matter of doing errands for Mrs. Sheldon, and while the evidence was not very weighty, it had a tendency to prove that the plaintiff did more errands for Mrs. Sheldon than getting the Christmas presents, concerning which the witness had already testified that Mrs. Sheldon had told her that the plaintiff had purchased for her. There was no error in receiving this testimony.

The witness, Cecile Branchaud, was asked, "Won't you tell how frequently she called, and what the nature of the purchases were?" referring by the word "she" in the question, to the plaintiff. The question was objected to on the same ground as that urged in the objection to the questions asked Mrs. Davis. The witness answered, "Some weeks she came every day and

some weeks twice a day; the nature of the purchases would be in the line of dry goods, buttons, laces, ribbons, anything in the nature of household goods, underwear." The witness testified without objection that the purchases made by the plaintiff would not be completed on the first trip of the plaintiff; that on the first trip samples were sent out for approval, and that when the purchase was finally made the goods were sometimes delivered to the plaintiff and sometimes delivered to Mrs. Sheldon by their delivery team, and that the goods so delivered were charged to and paid by Mrs. Sheldon. This evidence was material as tending to show the extent of services in the line of errands performed for Mrs. Sheldon by the plaintiff. This exception was not well taken.

This witness being recalled later in the trial was asked, "What do you say is a fair and reasonable price for work that I have suggested?" The work suggested was that of buying dress goods and shopping in the city of Rutland where Mrs. Sheldon lived when the alleged services were performed. The witness answered, "Twenty cents an hour." The ground of the objection to this question was that the witness was not qualified to express an opinion. The witness testified that she was acquainted or familiar with the price that was paid for work of buying dress goods and shopping, etc., in the city of Rutland. The testimony of the witness tended to show that she had means of knowing and did know what the price was for such services. There being some evidence of qualification, the finding of the trial court is not revisable. *Griffin v. The B. & M. Railroad*, 87 Vt. 278, 89 Atl. 220.

Octave George Chamberland was asked, "From that time on how frequently did you see Mrs. Raymond in your store trading there?" The question was not answered and the exception, therefore, is not available to the defendant. *Fraser v. Blanchard et al.*, 83 Vt. 136, 73 Atl. 995, 75 Atl. 797.

The next and last exception briefed is that the verdict was excessive, and should have been set aside on the defendant's motion. Such a motion is addressed to the sound discretion of the trial court, and is not reviewable, unless it appears that the court refused or failed to exercise its discretion or abused it. *Lincoln v. C. V. Railway Co.*, 82 Vt. 187, 72 Atl. 821, 137 Am. St. Rep. 998. It does not appear that the trial court did refuse

or failed to exercise its discretion or that it abused it. There was no error in overruling the motion.

Judgment affirmed, and cause ordered certified to the probate court.

HORACE C. PEASE v. EDWARD H. EDGERTON ET AL.
CHARLES V. TOMPKINSON v. EDWARD H. EDGERTON ET AL.

May Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed September 17, 1918.

Chancery—Interlocutory Orders—Appeal—G. L. 1561.

An order overruling a demurrer to a bill in chancery, and adjudging the bill sufficient, is not a final decree from which an appeal lies.

Leave to appeal granted by a chancellor, cannot enlarge the right of appeal conferred by G. L. 1561.

TWO PETITIONS FOR PARTITION against the same defendants, Windsor County. The petitions were transferred to the court of chancery. Heard on defendants' demurrers to the amended bills in Chambers on January 12, 1918, *Stanton*, Chancellor. From orders overruling the demurrers and adjudging the bills sufficient, the defendants were granted leave to appeal. Heard together in Supreme Court on plaintiffs' motions to dismiss the appeals.

D. A. Pingree for the plaintiffs.

Charles Batchelder for the defendants.

PER CURIAM. These cases were heard together on motion to dismiss the appeals and present the same question. The actions as originally brought were petitions at law for partition. Such proceedings were had therein that, on the application of

the plaintiff in each case, the cause was transferred to the court of chancery and amended into a suit in equity under the provisions of the Practice Act. In each case the amended pleadings terminated in a demurrer to the bill, which being brought on for hearing was overruled, and the bill was adjudged sufficient. Leave was granted the defendants to appeal by filing proper motions therefor. Appeals having been taken and entered in this Court, the plaintiffs move to dismiss for that the order appealed from in each case is not a final decree.

The motions are well grounded. The appeals were clearly from interlocutory orders, while the statute authorizes appeals from final decrees only. G. L. 1561. The leave granted could not enlarge the right of appeal conferred by the statute. It follows that the causes remain in the court of chancery awaiting further proceedings. *Ludlow Sav. Bk. & Tr. Co. v. Knight*, 91 Vt. 172, 99 Atl. 633.

Appeals dismissed.

A. T. DAVIS v. UNION MEETING HOUSE SOCIETY.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed September 17, 1918.

Chancery—Demurrer—When Waived—When not Before Chancellor for Decision—Adverse Decree—Exceptions Impliedly Overruled—Surplusage—Hearing on Merits.

The general rule in chancery is that a demurrer must be brought on for hearing before a trial is had on the merits, or it will be held to have been waived.

If, on review, a demurrant desires to avail himself of a demurrer which has been heard and overruled, the usual practice in chancery is to ask for an order reserving the benefit thereof until final hearing. In a suit in equity to restrain the prosecution of a suit at law, where the defendant's answer set up special matter by way of demurrer, and, after a full hearing on the merits, the chancellor sustained

the demurrer and dismissed the bill, but the record failed to show any action taken on the demurrer prior to the hearing on the merits, the demurrer was waived when the case went to trial on the merits, and was not before the chancellor for decision.

An adverse decree in chancery impliedly overrules the exceptions of the defeated party, and they are brought up for review by the appeal.

Where it sufficiently appears from the whole record that the case was disposed of on the findings, the reference in the decree to a demurrer is treated as surplusage, and the case ordered to stand for hearing on its merits.

APPEAL IN CHANCERY. Heard on bill, answer, replication, inspection of the premises, testimony of witnesses and argument of counsel at the September Term, 1916, Washington County, *Stanton*, Chancellor. Decree sustaining the demurrer and dismissing the bill with costs. The plaintiff appealed. The opinion states the facts.

J. Ward Carver and Erwin M. Harvey for the plaintiff.

John W. Gordon for the defendant.

TAYLOR, J. The bill was brought to restrain the defendant from prosecuting a suit at law pending in Washington county court to recover for trespasses alleged to have been committed by this plaintiff on premises occupied by the defendant and to determine plaintiff's equitable rights in the premises and restrain the defendant from further interfering with such rights. The defendant answered and insisted in the answer on special matter by way of demurrer. The case is here on plaintiff's appeal from the following decretal order: "The cause was heard by the chancellor on bill, answer, replication, inspection of the premises, testimony of witnesses and arguments of counsel on both sides, and thereupon it is adjudged, ordered and decreed that the injunction heretofore issued in said cause be dissolved; that the defendant's demurrer to plaintiff's bill of complaint is adjudged sufficient and is sustained; that the bill of complaint in this cause be dismissed; and it is dismissed, with costs to the defendant."

Inspection of the record shows that the bill and subpoena were dated February 27, 1915; that the chancellor ordered the

defendant to appear before him March 10, 1915, to show cause why the prayer of the bill for a temporary injunction should not be granted; that defendant's answer was filed March 10, 1915; and that the same day the temporary injunction was granted and became effective by the filing of the injunction bond. The case was tried by the chancellor at the September Term, 1916, and the findings of fact and decretal order were filed January 22, 1917. The plaintiff reserved certain exceptions which, it will be observed, are not expressly overruled in the decretal order. No mention is made of the demurrer outside of what appears in the decretal order.

The general rule in chancery is that the demurrant must bring his demurrer on for hearing before the merits are gone into or he will be held to have waived it. *Fairbank's Adm'r v. Keiser*, 86 Vt. 210, 213, 84 Atl. 610. Where the demurrant desires to avail himself on review of a demurrer which has been heard and overruled, the usual practice is to ask for an order reserving the benefit thereof until the final hearing. It has been held that the benefit of a demurrer may be treated as impliedly reserved where it has been heard and overruled followed by a hearing on the merits. *White River Sav. Bk. v. Capital Sav. Bk.*, 77 Vt. 123, 129, 59 Atl. 197, 107 Am. St. Rep. 754. In *Fairbank's Adm'r v. Keiser*, the defendants were allowed to file answers containing demurrers, pending the hearing on the merits. The demurrers were ordered to lie until the coming in of the master's report. They were brought forward at the final hearing and the bill was dismissed *pro forma*. The question was whether, in the circumstances, the demurrers were waived. In holding that the whole case came up, demurrers and all, after stating the general rule, the Court said: "But this is a rule of procedure, merely, and the chancellor may, in the exercise of a wise discretion, protect a demurrer from such a result by making an order to the effect that the hearing shall go on without prejudice to the demurrer."

In the case at bar the record fails to show that anything was done to save the demurrer from the effect of the general rule, and we must treat it as waived when the case went to trial on the merits. Having been waived, the chancellor had no occasion to refer to it in his decretal order. It was not before him for decision and was not reinstated by anything disclosed in the record. *Osha v. Higgins*, 90 Vt. 130, 96 Atl. 700; *Hooker Corser & Mitchell Co. v. Hooker*, 89 Vt. 383, 387, 95 Atl. 649.

Counsel treat the decretal order as disposing of the case on the demurrer alone. If we were to adopt their construction of the record we should be obliged to hold, as the plaintiff contends, that the demurrer was waived and could not be brought forward by the chancellor of his own motion and made the basis of his decree and so is not for hearing in this court. But the majority consider that it sufficiently appears from the whole record that the chancellor disposed of the case on the findings. Treating the reference to the demurrer as surplusage, the decretal order is complete and consistent with the proceedings leading up to it. The fact that plaintiff's exceptions were not expressly overruled does not stand in the way of reviewing questions sought to be saved thereby. The decree, being adverse, impliedly overruled the exceptions, and they are brought up by appeal.

The case is for hearing without reference to the demurrer.

Let the case stand for argument on the merits.

MATTIE H. AND HARRY L. FORD v. HARVEY HERSEY, A. T. SMITH
AND A. L. SMITH.

May Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 8, 1918.

Chancery—Cross bill—Abuse of Discretion—Question not Answered—Presumption—Objection After Answer Given—Harmless Error—Evidence.

This Court will not reverse the order of a chancellor denying a motion to file a cross bill, unless it is a clear case of an abuse of discretion, which is not shown by the facts in this case.

A question asked but not answered cannot result in prejudice to the exceptant.

When the record shows that a question was answered before objection was made, it will not be presumed that the answer was given before objection could have been made.

An objection made and exception noted after an answer responsive to a question is given, is too late to be availing.

Where the object was to show the different amounts and the sum total of money paid by a person during a certain period, the exclusion of evidence of the wages received by such person from his different employers during such period, was harmless.

Decree modified, with the consent of the plaintiff, to conform in substance with the equitable principle that he who seeks equity must do equity.

BILL IN EQUITY brought to set aside two deeds from plaintiffs to defendant Hersey. Heard on bill, answer, special master's report, defendants' exceptions thereto, motion of defendant Hersey for leave to file a cross bill, motion of defendant Hersey for an order on the receiver to pay a sum of money to him, and motion of defendants Smith for leave to file a cross bill, at the September Term, 1917, Chittenden County, *Fish*, Chancellor. Decree, overruling defendants' exceptions and motions, and for the plaintiffs as hereinafter stated. The defendants appealed.

The master reported that the plaintiff Mrs. Ford, who is a niece of the defendant Hersey, commenced living with him at his home in the city of Barre in 1895, and thereafter continued to live with him and assist him in his business affairs and about the house, until she moved to Burlington, on September 1, 1914, to live there with her husband, plaintiff Harry L. Ford; that on April 6, 1904, the said Hersey, by two certain warranty deeds of that date, conveyed to her certain premises owned by him in the town of Barre and city of Barre; that the consideration for such conveyance was founded upon an oral agreement that Mrs. Ford should support and care for said Hersey in a suitable manner during his life time; that there was no express understanding that she should reconvey said premises to him at any time he called therefor; that after the delivery of said deeds she came into the possession of said premises and took control of the same, and on January 9, 1913, was the owner of the same.

The master further reported that on or about January 9, 1913, Mrs. Ford was about to be confined and became fearful of the result of her illness, and, in the event of her death, desiring said premises to become the property of said Hersey, made two deeds conveying the same to him, each deed containing in the 8th and 9th lines thereof the words "not to record except at the

death of the grantor''; that an agreement was then and there made by her and the said Hersey that said deeds should be kept in a certain box in her room, and should be removed therefrom, delivered and recorded only in the event of her death, and she never consented to said Hersey's removing the deeds from said box; that on December 2, 1914, she received a letter from defendant Hersey, who was then living in Barre, stating that he had agreed to sell some of the property in the town of Barre, covered by her deeds, to defendants Smith; that she at once wrote Hersey protesting against this, and went to the box which had contained said deeds but did not find them there; that on December 7, 1914, said Hersey went to Burlington to live with the plaintiffs, and told them that he had fixed up the deeds so that they were as good as any deeds; that about the middle of April, 1915, Mrs. Ford found said deeds among the papers of said Hersey, and found that they had been altered by the erasure of the words in the 8th and 9th lines thereof "not to record except at the death of the grantor", and that they had been further altered in the handwriting of said Hersey by changing the descriptions of the property conveyed therein by striking out certain words and adding others, but such alterations did not affect the land thereby conveyed; that at some time said Hersey removed said deeds from said box where they had been placed by said Mattie H. Ford, made changes therein as above indicated, and held them until November 30, 1914, when he had them recorded in the Land Records of the city of Barre and town of Barre.

The master further reported that on December 4, 1914, said Hersey sold, and by his warranty deed of that date conveyed, to the defendants Smith certain of said premises situated in the town of Barre, for the price of \$1,000, which price was a fair value of said premises; that before purchasing said premises, the defendant A. T. Smith had knowledge of said alterations in the description in the deed of the premises in the town of Barre, but the master was unable to find that he had knowledge of the erasure of the words in the 8th and 9th lines of said deeds; that said sum of \$1,000 was applied by the said Hersey in payment of a certain note signed by Mrs. Ford for the sum of \$1,000, given by her to the Granite Savings Bank & Trust Company and then held by it, said note being secured by a mortgage executed and delivered to said bank by the plaintiffs on the premises in

the city of Barre conveyed to Mrs. Ford by said Hersey, which mortgage was executed and delivered subsequent to the time when she obtained title to the said premises, and prior to the execution of the deed to said Smiths; that said note was given, and the loan of \$1,000 procured from said bank, in order to aid said Hersey in publishing a book which he had written, but defendants Smith had no knowledge of the circumstances surrounding the securing of said loan or the purpose for which it was obtained; that Mrs. Ford had information from said Hersey of the proposed sale to the Smiths and wrote to him objecting to said sale, but never communicated with said Smiths in regard thereto, and made no demand upon them to reconvey said premises, and had no communication with them in regard thereto, prior to the bringing of the bill of complaint.

The master further reported that at the time of the execution of said deeds by said Hersey to Mrs. Ford on April 6, 1904, he was engaged in considerable litigation which was extremely troublesome to him, and an attorney was pressing him for the payment of a large bill, on which he soon after brought suit.

The allegations in the cross bill, which said Hersey asked leave to file, in substance, were, that on April 6, 1904, at the time of the conveyance to Mrs. Ford, reconveyances were made by Mrs. Ford to him; that the latter became lost or stolen and that was the occasion of the conveyance of January 9, 1913; that the occasion of the deeds of April 6, 1904, was certain litigation then pending and about to be brought against him and the object of the conveyances was to protect his property from what he considered an unjust attack, and in pursuance of the same scheme he caused suits to be brought by Mrs. Ford against him in which certain fire insurance companies were trustees; that later suits were brought against him which were adjusted to his satisfaction and the suit of Mrs. Ford was dropped; that at that time the Fords were living with him, and had so lived after their marriage on October 20, 1899; that these and other facts were told by him to his counsel but were not embraced in the answer and were not fully brought out at the hearing before the master; that the failure to bring out all of these facts, and the retirement of his counsel from the cause at his request, created a prejudice and bias in the mind of the master against him so that the master did not give proper consideration to the evidence, and his report and findings were the result of such prejudice and

bias; and, in addition to praying for a perfection of his title by way of cross bill, he asked to have a lien upon the real estate in question to the extent of some \$7,000 advanced to the plaintiffs, in the event the court should decide that his title to the real estate was not valid, and asked for a retrial of the whole matter before the chancellor and for general relief.

By the first two paragraphs of the decree it was ordered and decreed:

“(1) That the two deeds from the orators Mattie H. Ford and Harry L. Ford to the defendant Harvey Hersey dated January 9, 1913, and recorded respectively in the Land Records of the City of Barre, in Washington County, volume 22, page 232, and in the Land Records of the Town of Barre in said County, volume 12, page 284, be and the same are hereby adjudged to be null and void and of no effect, and the same are ordered to be expunged from the respective land records of said City and Town of Barre.

“(2) That the deed of the defendant Hersey to the defendants A. T. and A. L. Smith dated December 4, 1914, and recorded in the Land Records of said Town of Barre in volume 12, page 285, be and the same is hereby adjudged to be null and void and of no effect and is ordered to be expunged from the Land Records of said Town of Barre, provided and on condition that the orators pay to said defendants A. T. and A. L. Smith the sum of eleven hundred (\$1,100) dollars on or before thirty days after the date of the final decree in this case, with interest thereon from January 1, 1918, to the date of payment.”

Edward H. Deavitt and J. Ward Carver for the defendant Hersey.

This defendant should have been permitted to file his cross bill. *Hathaway v. Hagan*, 64 Vt. 135; *Van Dyke v. Cole*, 81 Vt. 379, 392; *Hyde Park Lumber Co. v. Hunt*, 90 Vt. 435.

Erwin M. Harvey for the defendants Smith.

V. A. Bullard and Sherman R. Moulton for the plaintiffs.

WATSON, C. J. It is said that the decree rendered below gives no consideration to the matters sought to be brought into

the case by the motion of defendant Hersey for leave to file a cross bill, and that in the circumstances of the case the denial of the motion was an abuse of discretion, and consequently an error which this Court will correct. The principle here invoked is well understood, but to make it applicable a clear case of such abuse must be made to appear. Our attention is called to the fact that it appears from the transcript that when the consideration or inducement for the deeds of April 6, 1904, was under consideration and Hersey was testifying concerning the matter, he was asked whether there was any other consideration or inducement for making those deeds. Whereupon counsel for plaintiffs objected on the ground that it went to those prior conveyances, which could not be done in the absence of a cross bill; and that it was not material to any issue in the case. The answer, which was in the negative, was received and exception saved by plaintiffs. The direct examination continued and, so far as it appears, the course of it was not changed by reason of this objection and exception. The master's report shows that the case was heard on the evidence in December, 1915, closing on the 29th; that after the taking of testimony was thus concluded, a further hearing was granted by the master, at Hersey's request, for the purpose of receiving more evidence, and such hearing was had on the 27th day of July, 1916. The master's report was filed on August 2, 1917, and exceptions thereto were filed by all the defendants on the 16th day of the same month. The motion by Hersey for leave to file the so-called cross bill was in fact a motion for leave to file a certain paper then presented, consisting of an amendment to his answer by way of allegations of new matter, and a cross bill praying for specific and for general relief, all of great length and sworn to by him on November 9, 1917. Consequently this motion was not presented to the chancellor at the earliest until the day last named, which was nearly two years after the aforementioned objection, based upon the want of a cross bill, was made. The additional allegations, except as to change of counsel and prejudice of the master presently to be noticed, show nothing not fully known to Hersey when he made answer to the bill. It is alleged therein, however, that he told all such additional facts to his counsel before the latter drew the answer, but that they were not included, and many of them were not shown in evidence. It is a part of the new allegations that during the progress of the hearing before the master, Hersey be-

came dissatisfied with the handling of his case, dismissed his counsel, and procured the services of new counsel; that the failure to bring out such additional facts and the change of counsel created prejudice in the master's mind against Hersey, by reason whereof the master did not give proper consideration to the evidence adduced by him, and found against the evidence in the case.

Just when the change of counsel took place does not appear; but it was prior to the hearing had before the master in July, 1916. On that occasion Hersey was represented by the new counsel. So if there was neglect of duty by his former solicitors in the respect named, the hearing of the case on the merits was concluded by the new solicitor who thereafter had charge of the matter without applying for leave to take steps remedying the effect of the alleged neglect of duty, until at least a year and four months after his employment and some three months after the report and exceptions thereto were filed, and immediately preceding the rendition of the decree. The record discloses no attempt to explain this delay in making the application. The full scope and purpose of the motion are realized when we notice that one of the special prayers of the proposed cross bill is that on account of the prejudice and bias of the master, a retrial may be had of the facts and issues involved in the case, and that such retrial may be had before the chancellor. Nothing is shown of record reasonably subjecting the master to criticism in the respect named. So far as appears he performed his duties fairly, fearlessly, honestly, and well. By the third and fourth paragraphs of the decree, the chancellor very properly disposed of the motion by denying it, and there was no abuse of discretion in so doing.

In his direct examination in defence, Hersey testified that at the time he gave the two deeds to plaintiff Mattie H. Ford, there were several other matters which were embarrassing him. In cross-examination he testified that the property in question in the town of Barre was deeded to him by one Payne. He was then asked whether Payne embarrassed him and answered, "That was all settled." Being asked if Payne was one of the gentlemen who was embarrassing him, he answered, "Not in 1905. Q. About that time? Ans. Five years before that. Q. When did you get settled up with Payne? Ans. When that deed was given." Thereupon his counsel objected on the ground of im-

materiality because of remoteness, and an exception was noted. The next question related to the same subject-matter and an exception was saved, but the question was not answered. He was asked whether the Payne case was tried before Mr. Senter as master, and answered in the affirmative. Objection was then made and exception noted. He was further asked whether he had had some experience in making erasures in deeds prior to 1904. Objection was made to the question, but no exception was saved to the ruling.

It is argued that since one much contested question in the suit at bar was whether Hersey made erasures in the two deeds in controversy, as alleged in the bill, the foregoing evidence relating to the Payne matter was pressed for the purpose of creating prejudice in the mind of the master against him by insinuating that he made erasures in a matter entirely immaterial here, and the reception of the evidence in the circumstances was error. The question asked but not answered could not have resulted in prejudice to the exceptant. This leaves the two exceptions taken after the questions had been answered. The record contains nothing showing that either of these questions was answered before an objection could have been interposed, and it will not be presumed. The answers given were responsive to the questions, and the exceptions were too late to be availing. *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *State v. Fitzgerald*, 72 Vt. 142, 47 Atl. 403; *State v. Powers*, 72 Vt. 168, 47 Atl. 830.

Hersey was asked in direct examination what wages the plaintiff Harry L. Ford received from his different employers while he was living at the witness's home. The master ruled, excluding evidence of this character pointing to the time prior to 1904, when the deeds were given by the latter to Mrs. Ford, and an exception was noted. An offer was made to show the actual amount of money paid in to the witness by Harry L. while he lived in the family there with the witness, the amount per week, and the different amounts from the time he went there and during the time he lived there. This offer was excluded and exception saved. The offer did not include a statement of the amount which defendant purposed to show was paid in either as a whole or at the different times. The object of the evidence which defendant was trying to introduce was to show the sum total and the different sums so paid in, not the fact of there being money paid in by Harry L. This being so, we cannot say that any

harm resulted to defendants from the ruling, and the exception is without force.

Defendants Smith took exceptions to the report, and an appeal from the decree; but in argument they only ask that the payment to them by the plaintiffs of the \$1,100 and interest mentioned in the decree, be made secure by the terms of the decree. In this respect the decree, as rendered, is based upon the principle that he who seeks equity must do equity. Whether this rule, as generally applied, extends far enough to affect the matters in which defendants Smith are here particularly interested, we need not inquire; for not only are the plaintiffs satisfied with its application as made by the chancellor, but consent that the provisions in this respect be made more specific, as desired by the Smiths, if they can be and the decree in its general provisions remains unchanged. By the decree, the deed therein specified as given to them by defendant Hersey, is "adjudged to be null and void and of no effect and is ordered to be expunged from the land records, * * * provided and on condition that the plaintiffs pay to said defendants" Smith the sum specified, within a time limited, with interest thereon, etc. That such payment may be secure as desired by the Smiths, and as consented to by the plaintiffs, this part of the decree should be so amended as to have an alternative provision to the effect that if the said sum with interest thereon be not paid as there ordered, within the new time limited therefor, relief to the plaintiffs as against the said deed from Hersey to defendants Smith is denied, and the bill dismissed as to the latter with their costs. When thus amended, the decree in this regard will conform in substance to decrees as sometimes rendered, when based upon the equitable principle mentioned, and be sufficiently protective of the rights of the parties.

The decree is altered to conform to the views above expressed, and, being so altered, it is affirmed and cause remanded. Let a new time be fixed within which the payment shall be made by the plaintiffs to defendants Smith.

CHARLES D. HAZEN ET AL. v. SUMNER W. PERKINS.

Special Term at St. Johnsbury, April, 1918.

Present: WASTON, C. J., POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 8, 1918.

Acts of Public Officials—Presumption—Public Waters—Lands Bounding—Title To—Control of by Private Persons for Private Purposes—Grant by Legislature—Regulation of Common Fishery—G. L. 1875—Title by Prescription—Lower Mill Owner—Public Nuisance—Remedy by State—Rights of Riparian Owners—Special Damage.

Lake Morey, covering an area of six hundred and forty acres, being extensively used for boating with rowboats, canoes, motor boats, and a steamer, and having boathouses, retaining walls, and structures on its shores for use in getting into and out of boats, is boatable, as matter of law, and is public waters within the provision of the Constitution (Chap. II, sec. 63).

It will be presumed, the contrary not being shown, that the fish and game commissioners, in constructing a dam and sluice at the outlet of Lake Morey, pursuant to the directions of No. 140 of the Public Acts of 1896 and No. 228 of the Public Acts of 1908, authorizing and directing them to make such repairs to the outlet of the lake as was necessary to protect its waters, the fish therein, and the property below the outlet, acted in accordance with the law and their instructions, and that the dam and sluice constructed by them did not work any violation of the rights of the riparian proprietors.

Grants of land bounding upon a boatable lake pass title only to the water's edge, or to low-water mark if there be a definite low-water line.

Title to the waters of a boatable lake as such, or to the lands covered by the same, cannot be acquired by grants from private sources.

The waters and the bed or soil of boatable lakes are held by the people in their character as sovereign in trust for public uses for which they are adapted.

The General Assembly cannot grant to private persons for private purposes, the right to control the height of the water of a boatable lake, or the outflow therefrom, by artificial means, for such a grant would be inconsistent with the exercise of such trust.

- A grant of the right to control the height of the water of a boatable lake, or the outflow therefrom, by artificial means, for private purposes, cannot be intended as the basis of a decree, since the General Assembly is powerless to make such a grant.
- The power of proper regulation of common fishery in the public waters is reserved to the General Assembly by the Constitution (Chap. II, sec. 63); and, in the exercise of the police power, it may adopt such constitutional measures as it deems necessary for the preservation of such public property and the common rights therein.
- No. 140 of the Public Acts of 1896 and No. 228 of the Public Acts of 1908 were proper measures for the protection of common fishery in Lake Morey.
- Under G. L. 1875, providing that nothing contained in the statute of limitations shall extend to state lands, a right to control the flow of water from a boatable lake by artificial means, cannot be acquired by prescription.
- A lower mill owner has no right, by artificial means, to vary the level of the water of a boatable lake above or below its natural level, as regulated and controlled by a dam and sluice lawfully erected at its outlet by the State.
- A gate and flashboards unlawfully placed at the outlet of a boatable lake, whereby its water is raised above or lowered below its natural level, as regulated and controlled by the State, affect the common rights of all persons, and constitute a public nuisance, against which a remedy may be had in behalf of the State, either in equity or by way of criminal prosecution.
- To entitle plaintiffs to maintain a private suit in equity for injunctive relief against such public nuisance, they must show that they have suffered some special and substantial injury distinct and apart from the general injury to the public.
- The rule that a right to maintain a public nuisance cannot be acquired by prescription, obtains in actions by private individuals, who have suffered a peculiar injury.
- In a suit in equity to enjoin the defendant from maintaining a public nuisance by unlawfully raising and lowering the water of a boatable lake by artificial means, and to recover private damages suffered thereby, where it is found that the plaintiffs suffered nominal damages only, apart from the general injury to the public, the bill will be dismissed.

APPEAL IN CHANCERY, Orange County. Heard on special master's report, and plaintiffs' exceptions thereto, in chambers on March 8, 1917, *Fish*, Chancellor. Decree that the bill be dismissed with costs to the defendant. The plaintiffs appealed.

Charles Batchelder for the plaintiffs.

The court will take judicial notice of the fact that Lake Morey is one the largest bodies of water in the State. *Cash v. Auditor, etc.*, 7 Ind. 227; *State v. Wabash Paper Co.*, 21 Ind. App. 167; *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 36, 45; *Talbot v. Hudson*, 16 Gray, 417, 424.

Capacity is the test in determining if waters are navigable. *The Montello*, 20 Wall. 430, 22 L. ed. 391; *People v. Canal Appraisers*, 33 N. Y. 461; *Weise v. Smith*, 3 Ore. 445, 8 Am. Rep. 621.

If the situation is such that in all probability the waters will become useful for business or pleasure, then they are public. *Farnham on Waters*, 127; *Walker v. Allen*, 72 Ala. 456; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439.

Waters navigable in fact are navigable in law, if reasonably capable of available use as a public highway. *Concord Mfg. Co. v. Robertson*, 66 N. H. 125 Atl. 718; *Morgan v. King*, 35 N. Y. 554; *Barney v. Keokuk*, 94 U. S. 324; *Cooley Cons. Lim.* 726-728.

Owners along an outlet stream, flowing from a natural pond, have nothing but the right to the natural flow. They cannot operate devices to regulate the level of the pond, but must take as nature provides. *Mohr v. Gault*, 10 Wis. 513, 78 Am. Dec. 687; *Fernald v. Knox Woolen Co.*, 82 Me. 48; *Potter v. Howe*, 141 Mass. 354, 6 N. E. 233.

John G. Sargent and *David S. Conant* for the defendant.

WATSON, C. J. The plaintiffs, severally owners of land abutting on Lake Morey, a natural body of water in the town of Fairlee, on which are built cottages for summer occupancy, seek an injunction against defendant, requiring him to remove the gate and all structures erected by him at the outlet of said lake for the purpose of affecting the level thereof, and perpetually enjoining him from erecting or maintaining at said outlet any artificial structure for the purpose of raising or lowering the

water of the lake, and to recover damages suffered in the premises.

The outlet of the lake is a small stream which flows southerly and southeasterly into the Connecticut river. The plaintiffs Hazen, Watson, and Low, are the owners in common of a water privilege, known as the Pierce privilege, on the outlet stream. The defendant owns and occupies certain lands and a water privilege, here known as the Perkins privilege, on the outlet stream southerly of and below the Pierce privilege, and claims and has exercised the right, in connection with the use of his water privilege, to raise the water of the lake by means of a gate and flashboards at the outlet, for the purpose of conserving the water supply at his privilege, and to lower the same as his needs at the latter place may require. His mills are 382 rods from the outlet of the lake, and the crest of his dam is about $15\frac{1}{2}$ feet lower than the crest of the outlet dam. He owns no land abutting on the lake.

The defendant claims that he had the right, by grant through successive owners from one of the original proprietors of the town, to control the flow of water from the lake in connection with the use and enjoyment of his said water privilege, and that he and his successive grantors in title have exercised such right continuously, openly, notoriously, exclusively, and under a claim of right, for more than one hundred and twenty years, and down to the bringing of this bill.

The case was heard by the chancellor on the report of a special master and plaintiffs' exceptions thereto. The exceptions were overruled and the bill dismissed with costs to the defendant. The plaintiffs appealed; but in presenting the case for review they take no note of the exceptions. Our considerations are therefore confined to the rights of the parties as based upon the pleadings and the facts of record.

It is argued that this Court knows judicially that the waters of Lake Morey are public waters. Very likely we might take judicial notice that the waters of this lake are boatable, as a part of the principal features of the geography of the State (*The Montello*, 11 Wall. 411, 20 L. ed. 191), were it necessary in determining their character; but it is not necessary. The master reports that this lake has an area of some six hundred and forty acres; that on its shores are located from eighty to one hundred cottages, occupied during the summer season for pur-

poses of pleasure and recreation; that there are also located on the lake two hotels and a large casino or place of amusement, and several girls' camps, so that during the camping season the lake is a considerable summer resort, the number of people annually frequenting it as such being estimated at about seven thousand; that the lake is used extensively for boating by the occupants of the cottages around it, for which purpose a considerable number of rowboats and canoes are used, together with ten or more motorboats; that a steamboat plies thereon, making regular trips during the summer season for the purpose of carrying passengers around the lake; and that on the shore adjacent to some of the cottages are boathouses and retaining walls, and structures of one sort or another for use in getting into and out of the boats and canoes. On these facts the waters of Lake Morey are boatable, as matter of law, and therefore they are public waters within the provisions of the Constitution as construed in *New England Trout and Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569. And they have been so deemed and acted upon by the General Assembly: by No. 140 of the Public Laws of 1896, the fish and game commissioners were authorized and directed to examine the outlet of this lake, and to take such steps as might be necessary in repairing the same to protect the waters of the lake and the property below the outlet, money being appropriated for such purpose; again by No. 228 of the Public Acts of 1908, the fish and game commissioner was directed to make a similar examination, and to cause such repairs of the outlet to be made as were necessary for the protection of the waters of the lake and the fish therein.

During the years 1897-1898 the fish and game commissioners, pursuant to the directions of the former act, caused to be constructed at the outlet a pile dam in the neighborhood of three hundred feet long, with a sluice some forty feet long and two feet wide, and having a plank bottom to serve as an outlet. The bottom of this sluice was fixed at a level several inches higher than the bottom of the old sluice. Across the new sluice, as an obstruction to the flow of water through it, were placed two planks two inches wide and one four inches wide. No gate was constructed in the sluice, so that, except as controlled by natural causes, the top of these planks fixed the height of the water in the lake. No claim is made that the dam and sluice, so put in by the State, caused the water to encroach upon the lands of the

riparian proprietors, or worked any violation of their rights. And it will be presumed, the contrary not being shown, that these public officers acted in accordance with the law and their instructions. But after such work was done, the defendant put in the gate now existing at the outlet, by cutting out the two bottom planks and constructing a gate to operate on the inside, or lake side, of the remaining plank, with a means of raising and lowering the same. From this we understand that the gate did not operate to raise the height of the water of the lake, but it enabled the defendant to lower it to the level of the bottom of the sluice, eight inches below the level fixed by the authorized agents of the State. In addition to the use of this gate, defendant has used flashboards at the outlet to raise the level of the lake whenever he needed more storage of water for his mills, and he appears to have done this from time to time ever since he acquired title to his water privilege in March, 1895. He admitted having used two flashboards consisting of 2 x 4 pieces, which would raise the normal level eight inches. No finding is made at variance with this admission.

Being public waters according to the test afforded by the Constitution, the grants of land bounding upon the lake pass title only to the water's edge, or to low-water mark if there be a definite low-water line. *Fletcher v. Phelps*, 28 Vt. 257; *Jake-way v. Barrett*, 38 Vt. 316; *Austin v. Rutland R. R. Co.*, 45 Vt. 215. The bed or soil of such boatable lakes in this State is held by the people in their character as sovereign in trust for public uses for which they are adapted. *Illinois Central R. R. Co. v. People*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. ed. 1018; *Revell v. People*, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790. The defendant did not, therefore, acquire any title to the waters of the lake, as such, nor to the lands covered by such waters, by grants from private sources. And the General Assembly cannot grant to private persons for private purposes, the right to control the height of the water of the lake, or the outflow therefrom, by artificial means, for such a grant would not be consistent with the exercise of that trust which requires the State to preserve such waters for the common and public use of all. *Illinois Central R. R. Co. v. People*, cited above; *Prieue v. Wisconsin State Land, etc., Co.*, 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 85 N. W. 402, 83 Am. St. Rep. 905. The General Assembly

being powerless to make such a grant, none can be intended as the basis of the decree. *Trustees of Caledonia Co. Gram. School v. Howard*, 84 Vt. 1, 77 Atl. 877. The power of proper regulation of common fishery in such public waters is, by the Constitution, reserved to the General Assembly (Const. Chap. II, Sec. 63); and in the exercise of the police power, it may adopt such measures (within constitutional limits) as it deems necessary for the preservation of such public property and the common rights therein. *State v. Theriault*, 70 Vt. 617, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L. R. A. 290; *State v. Haskell*, 84 Vt. 429, 79 Atl. 852, 34 L. R. A. (N. S.) 286; *Bondi v. Mackey*, 87 Vt. 271, 89 Atl. 228, Ann. Cas. 1916 C, 130. Each of the legislative enactments before adverted to created means of carrying out a purpose to this end.

It is urged on the facts reported, however, that in connection with the use of his water privilege, defendant has a prescriptive right to control the flow of water from the lake by means of a dam or gate at the outlet. In disposing of this question it is not necessary to consider the application of the general rule of construction that general words used in a statute will not apply to a state to the detriment of sovereign rights or interests unless such an intent clearly appears from the language used (see *State Treasurer v. Weeks*, 4 Vt. 215; *Gibson v. Choutau*, 13 Wall. 92, 20 L. ed. 534); nor need we consider the facts of record on which the claim of such prescriptive right is based; for the earliest time when any artificial means of controlling the flow of water from the lake is found to have existed, was in March, 1790, and in 1801 and in 1802, before the period of the statute of limitations applicable to lands had expired, Acts were passed by the Legislature expressly declaring that nothing contained in the statute of limitations shall be construed as affecting the title to any lands belonging to the State. A similar statutory provision has hitherto existed, and is now found in G. L. 1875. With such a statute in force, no prescriptive rights, such as are here claimed by defendant, affecting real property of the State, could be acquired. *Trustees of Caledonia Co. Gram. School v. Howard*, cited above.

It follows that defendant has no right, by artificial means, to raise the height of the water of the lake above, or to lower it below, its natural level as regulated and controlled by the dam and sluice erected at the outlet by direction of the General Assembly,

under the provisions of the aforementioned enactments of 1896 and 1908; and the gate and flashboards put in and used by him at that place for the purpose of controlling the height of the water, and thereby raising it above, or lowering it below, its natural level, as regulated and controlled by the State, affect the common rights of all persons and produce a common injury. They therefore constitute a public nuisance, against which a remedy may be had in behalf of the State, either in equity or by way of criminal prosecution. But in order for the plaintiffs to maintain a private suit in equity for injunctive relief against such public nuisance, they must show that they have suffered some special and substantial injury, distinct and apart from the general injury to the public.

Some of the beaches around the lake are flat and more or less sandy, and the water over them shallow, this being true at the northerly end of the lake in the vicinity of the property of plaintiff Low, and also at the southerly end near the outlet. Adjacent to the property of plaintiff Watson, the shore is rocky, coming down rather abruptly to the shore line, and then extending out very gradually into deeper water. The conditions of the lake in this respect opposite the shore properties of the other plaintiffs, are not shown by the record. Along the banks of the lake in many places are trees and shrubs, some of them growing close to the shore line.

The plaintiffs claimed damage to their cottage properties by reason of the variations in the heights of the water occasioned by the defendant in the use of flashboards as stated above, and especially: (1) That the artificial raising and lowering of the water level by him during the summer season has rendered it inconvenient and unsafe for them to use wharves erected adjacent to their lands, in getting into and out of boats used for pleasure on the lake; (2) that in some cases the wharves have been damaged by ice in the winter, owing to variations in the height of the lake occasioned by defendant, and that shade and ornamental trees growing on the shore of their lots have thereby been washed away and lost; and (3) that the shallow beaches have been left exposed by the recession of the water, so as to give off offensive odors, thereby rendering the occupancy of plaintiffs' cottages near them unpleasant and detrimental to health.

The master states that the testimony on this branch of the case appears to be inclusive, because it is impossible to draw the

line with any degree of accuracy between the natural effects of such variations in the lake level as would result from ordinary high water in the early spring and late fall, and by reason of having rains, and the enhanced effects, if any, caused by artificial increases in the high-water and low-water levels. He then reports specifically that as to the loss of shade and ornamental trees, the testimony is too vague and indefinite to warrant a finding either way; that as to the alleged damage from ice, the testimony affords no basis for determining how much, if any, defendant has raised the lake level in the winter and early spring so as to aggravate the natural effects of the ice upon the banks, and upon structures thereon; and in the other respects named, that the testimony fails to charge defendant with responsibility in fact, for substantial damage, if any, suffered by the plaintiffs.

The master states, however, that it goes without saying that any artificial variations in the height of the water of the lake have accentuated the adverse effect upon the shore properties of the plaintiffs, in respect to wholesomeness, convenience of access by water, beauty and enjoyment in use, incident to the natural fluctuations in the water level; and so he accordingly finds that plaintiffs Watson, Cookman, Mather, and Low, have sustained nominal damage to their respective shore properties by reason of defendant's acts in maintaining and operating the gate at the outlet dam, and in the use of flashboards thereon, their right to recover the same being contingent upon other considerations.

Yet such finding of nominal damage is not enough to entitle the plaintiffs to the relief sought; for the damages established as suffered must be not only special and distinct from those suffered by the general public, but they must be substantial as well. *Sargent v. George*, 56 Vt. 627; *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341; *Nelson v. Swedish, etc., Cemetery Assoc.*, 111 Minn. 149, 126 N. W. 723, 127 N. W. 626, 34 L. R. A. (N. S.) 565, 20 Ann. Cas. 790.

The findings show no such invasion of the rights of any of the plaintiffs as, if continued for a certain length of time, may ripen into an easement; for the rule that a right to maintain a public nuisance cannot be acquired by prescription, obtains not only in proceedings in behalf of the public, but also in actions by a private individual who has suffered injury special and peculiar to himself. *Mills v. Hall*, 9 Wend. (N. Y.) 315, 24 Am. Dec.

160; *Birmingham v. Land*, 137 Ala. 538, 34 So. 613; *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149; *Meiners v. Frederick Miller Brewing Co.*, 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586.

In our disposition of the case it has not been necessary to determine what, if any, effect the reservation of rights of flowage in the deed of house lot No. 69 (it being the shore land now owned by plaintiff Low) from Samuel Morey (under whom defendant claims to hold the same rights) to Rufus F. Ormsby, dated October 29, 1823, might have as against Low, were that question reached. See *Troy v. Coleman*, 58 Ala. 570; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538, 559, 14 Am. Rep. 322.

Decree affirmed and cause remanded.

ELISHA BIGELOW, ADMR. OF EDMUND C. MORSE'S ESTATE v. TOWN OF ST. JOHNSBURY.

February Term, 1918.

Present: WATSON, C. J., HASKELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 8, 1918.

Motion for Verdict—Insufficient Culvert—Question for Jury—Evidence—Does not Prove Negligence as Matter of Law—Operation of Automobile—G. L. 4705, 4709—G. L. 4617, 4618—Notice to Town in Case of Death—Next of Kin—Construction of Statutes—Construction Leading to Absurd Consequence Avoided—Revision of Statutes—When not Regarded as Altering Law.

In passing upon a defendant's motion for a directed verdict, the evidence must be considered in the light most favorable to the plaintiff.

In an action against a town for decedent's death, caused by the car he was driving tumbling over an alleged insufficient culvert, the question of the insufficiency of the culvert for lack of a railing or guard suitable to the place and condition, was for the jury.

Evidence that the decedent had said he might have to stop driving nights because, when he met a car, the reflection was so strong on the windshield that it reflected on his glasses and bothered him to see the road, does not prove, as matter of law, that he was negligent in driving his car at the time of the accident, particularly, when it did not appear that at that time his vision was so affected.

Evidence that after the accident the brakes of the decedent's car were found to be loose, does not prove, as matter of law, that at the time of the accident he violated P. S. 4094, as amended by No. 147, Acts of 1912 and No. 141, Acts of 1910 (G. L. 4705, 4709), in not providing his car with an adequate brake, and in approaching a curve without having his car under perfect control, in view of other evidence that he was then running slowly and had full control of his car.

P. S. 4031, 4032 (G. L. 4617, 4618), requiring one injured through the insufficiency of a bridge or culvert to give notice to the town, does not apply to persons financially injured through the death of their next of kin.

In considering a statute, an absurd purpose will not be attributed to the lawmakers, and a construction leading to an absurd consequence will always be avoided.

Changes in a revision of statute will not be regarded as altering the law, when it is settled by plain language in the statute or by judicial construction, unless it is clear that such was the intention.

ACTION OF TORT to recover for death of intestate caused by defect in a culvert in highway. Plea, the general issue. Trial by jury at the June Term, 1917, Caledonia County, *Fish, J.*, presiding. Verdict for the plaintiff. The defendant excepted.

Searles & Graves for the defendant.

Approaches of a bridge are whatever is necessary to connect the bridge with the public roads or streets, either at the end thereof or to make such roads or streets conform to the grade of the bridge. *Tinkham v. Stockbridge*, 64 Vt. 480; *Chicago v. Pittsburgh, etc.*, *R. R. Co.*, 247 Ill. 319; *City of Bloomington v. Illinois Cent. R. Co.*, 49 Ill. App. 129; *Daniels v. Town of Athens*, 55 Ga. 609; *Town of Ohio v. M. Ry. Co.*, 45 Ill. App. 572; *Words and Phrases*, Vol. 1, 466.

The weakness of the guard rails was not an insufficiency of the drain pipe. They were a part of the dirt highway on solid ground outside of, and distinct from, the drain pipe. *Castle v. Guilford*, 86 Vt. 540; *Fifield's Adm. v. Rochester*, 89 Vt. 329.

A culvert is an arched passage or drain for water beneath a road, canal or railroad. *Carroll County Commissioners v. Bailey*, 122 Ind. 46, 23 N. E. 672; *Herrick v. Holland*, 83 Vt. 502; *Gale v. Dover*, 68 N. H. 403, 44 Atl. 535; *Boyd v. Derry*, 68 N. H. 272, 38 Atl. 1005.

The plaintiff is precluded from a recovery, because his intestate, although approaching a curve in the road, did not have his automobile under perfect control, as required by the statute. He was guilty of contributory negligence, as a matter of law, *Rebillard v. Minn. St. P. & Ste. M. R. Co.*, 216 Fed. 503, 133 C. C. A. 9, L. R. A. 1915 B, 953; *Houston Belt & Terminal R. Co. v. Rucker*, (Tex. Civil App.), 167 S. W. 301; *Garrett v. Peoples R. Co.*, 6 Penn. (Del.) 29, 64 Atl. 254; *Wentworth v. Waterbury*, 90 Vt. 60.

H. C. Shurtleff and Guy W. Hill for the plaintiff.

STATEMENT BY WATSON, C. J. This action is brought under the statute, in the name of the personal representative of Edmund C. Morse, deceased, for the benefit of his next of kin, for damages sustained through his death in an automobile accident when traveling upon a public highway in the town of St. Johnsbury, on the 22nd day of October, 1916.

At the close of the evidence the defendant moved for a directed verdict on grounds stated in its brief under four heads as follows: (1) The place of the accident was not a culvert, within the meaning of the law; (2) negligence on the part of the town is not shown; (3) the decedent was guilty of contributory negligence; and (4) no recovery can be had, because notice of the accident was not given as required by statute. The motion was overruled, and exception saved.

The evidence introduced on the trial is stated below only so far as is necessary in disposing of the foregoing motion, outside of which no question is presented.

The evidence showed, or tended to show, stated in its most favorable light to the plaintiff, the following facts: At the time of the accident Morse (the decedent), accompanied by his

wife, and the Misses Alice F. Bancroft, Maud E. Wetherby, and Amelia D. Lee, was driving his automobile northerly over the public highway between St. Johnsbury Center and Lyndon, going north. This road is much traveled. The place of the accident is some five hundred feet north of the railroad crossing, known as the "Cobb Crossing." Along there for some distance the road was constructed by a sidehill cut most of the way, removing material from the upper or west side and placing it on the lower or east side to make the fill. The evidence as to the length of the fill varied, showing it to be from 79 feet to 200 feet long. The width of the traveled portion of the road over the fill varied from 13½ feet to 17 feet and 9 inches. At the culvert it was "a bad narrow place." Beneath the surface of the highway at a certain place in this fill is a culvert consisting of a tile drain, eight inches inside diameter, covered by the fill, and down four or five feet from the top of the edge of the road. The bank there is quite steep and near six feet high on the easterly side of the road. On that side the tiling seems to be protected only by earth. On the westerly side of the road there is a high ledge which goes up to the height of 25 to 30 feet, but it does not extend so far north as the culvert. Between the ledge and the culvert, and extending some farther north, the ground is higher than the road and slopes towards it. At the upper end of the culvert, rocks and stones are built up to the height of two or three feet around the tiling. The drain extends diagonally across the road, and on the culvert there is a curve in the road toward the east. The culvert runs through the fill, except at the upper side of the road, and consequently no part of the fill was necessary (in constructing the road) as an approach or as approaches to the culvert, and none of it was put in for such purpose. No stream of water runs through there regularly, but the culvert is necessary in the spring of the year, and in times of rain storms, to carry off surface water. The object of the fill was to improve the grade, not to fill up to the structure of the culvert so that travelers may the better pass over it. There was a fence on the bank of the fill, made of wooden posts about four or six inches in diameter, set in the ground, and boards an inch in thickness nailed thereto. Over the culvert and along southerly from it for some distance, the posts were rotten where they went into the ground, and the boards were old, weather beaten, and rotten; and along the same place and distance the fence was

down the bank about eighteen inches below the level of the road, and leaning more or less outward from the road. New filling had been put into the road, making it higher than the top of the ground where the fence posts were.

The accident occurred on Sunday evening about 6.30 o'clock. The night was very cloudy and quite dark. The decedent was seated on the left hand side of the front seat. His wife sat beside him. The young ladies mentioned sat on the rear seat. When at the Cobb Crossing they noticed the lights of two automobiles which were coming from the north on the other side of where the accident happened. They saw the two cars coming and spoke about them. The car ahead was being driven by one Dudley who was accompanied by his wife; the other car was occupied and being driven by one Shepard. On the trial of this case, Dudley testified that his car met and passed the decedent's car about thirty feet south of the culvert; that at that time both cars were running slowly because of the curve in the road; that the decedent's car, with its lights burning, "was coming along the road very slowly," and shortly after he passed it the car seemed to strike the fence and at the same time rolled sidewise over the embankment; that at the time the car went over it was running extremely slow or had practically stopped; that the fence offered no resistance to the car, it broke, and the part hit by the car simply fell over the bank; that he did not think it scraped the fence before it went over—went over about the time it struck the fence; that the lights from Shepard's car shone directly on decedent's car, and lighted up the road very clearly; that he did not notice the tiling (of the culvert) that night, but was there later and could pick out the place where the car landed at the bottom of the bank; that this was at about the same point as the mouth of the tile,—he found glass there evidently from the windshield of the car.

Morse and his wife were almost instantly killed, and Miss Wetherby was so injured that she was thereafter unable to remember very much about the accident.

Shepard, who was driving the second car seen coming from the north, testified to seeing the accident; that at the time it occurred he was a little north of the place where it occurred and going south, facing it; that he saw the decedent's car and Dudley's car meet, and that about the length of a car past their meeting the lights of the decedent's car began to tip and the

car went over; that he ran down to where the car was and did what he could in helping to lift the car and get the people out from under it; that he visited the scene of the accident the next afternoon, and then examined the fence, or rather noticed a new fence there; that where the car went over the bank the dirt seemed to be soft; that he should think the car went down six feet before it stopped, and should think the tile pipe was down four or five feet from the edge of the road; that the car went over "nearly directly on the curve." The witness was then asked "And that is where the culvert is that you have told us about?" Answering, he said, "Yes, I think the culvert is really to the north, just at the edge where the road straightens." He further testified that the decedent's car was going ahead very slowly when it tipped over; that the next afternoon when there, he "could see where the windshield was broken and where the rods stuck in the earth and the oil from the engine run out"; that this was just at the end of the drain pipe, just front of the end, and it was where the car stopped when it went over the bank; that the car went off sidewise. In re-cross-examination the witness said, "It appeared that, it seemed to tip nearly straight, bodily, as though it had given right out under the wheels and, facing the light, it looked as though it simply tipped over."

The witness testified to examining the tracks that afternoon. Thereon he said there was only about ten or twelve feet of track over the bank, which he considered was made by decedent's car; that as "it broke off it made a track of some ten or twelve feet, a little more than the length of the car"; that this track was nearly directly under the car, a little over the length of the car, not back ten or twelve feet. Defendant's attorney then asked the witness, "Then you really think don't you Mr. Shepard, that that just caved right off there with him sideways?" To which the witness answered, "Yes, sir." In answer to the question whether there was any evidence there in the tracks, of the car sliding sidewise or otherwise, he said it did not appear to him that it slid sidewise at all; that "it simply went down there and the turf cut off and it went off." The witness said he saw a track below post holes back 30 or 40 feet, but it was not a fresh track, and he was positive it was made at some other time—not made by the decedent's car; that he saw tracks back

not over five or six feet which could have been made by that car, just a mark as it went off the bank.

Miss Bancroft, a school teacher and one of the young ladies mentioned as riding in decedent's car, testified that she sat on the right hand side of the back seat, next to the fence. On being asked what she remembered about the accident, she stated that she remembered noticing, when at the Cobb Crossing, the lights coming down the hill on the other side of where the accident occurred, and spoke about them, but did not remember anything else until they crashed over onto the fence and went down the bank, tipped onto the fence; that she remembered hearing the crash then. She further testified that the car was going very slowly; that her head was resting on the back of the car; that she does not remember that she felt any severe jolting before the car tipped and went over; that she did not hear the car scraping the fence before the car tipped over, and did not know they were near a bank or anything—did not hear any cracking of boards or anything of the kind.

Miss Lee, another of the young ladies riding on the back seat, testified that the car was going very slowly; and tipped over sideways; that the whole side of the car seemed to settle at once, and the car within a second more turned over.

William Ahern, a man forty years old, who had always lived in the house on that road immediately north of the place of the accident, and owned the field adjoining the highway on the east of that place, testified to helping lift up the car so to get the people out from under it after it went down the bank, and that he knew where the tile pipe was on the lower side of the road. He was then asked to tell where the car was that night with reference to this tile pipe, and answered that he should judge that the car was partly or a little more than half way north of the tile pipe, tipped over. This witness gave further evidence tending to show that the car passed over the tile pipe in going down the bank. In cross-examination he said the car finally landed in front of the opening of the tile pipe—tipped over there. He further testified that there had always been a little culvert there, and that the tile pipe had been in about fifteen years; that the fence at the culvert was made of inch boards, and must have been there about the same number of years.

Jack Adams, who was at the place of accident about 7 o'clock that night, testified that he looked the fence over and

noticed it was old, one or two of the posts being rotted away where they went into the ground, and the boards old and rotten; that the post holes were on a slant down some 18 inches from the roadway, and the road was narrow at that place; that he saw a wheel track along the edge of the bank inside of where the post holes were; that the wheel rut went past three or four post holes before the car went over the bank; that he followed the track back, but not as far as the point of the ledge; that the track was out of the beaten track of the road, but not out of the road; that the distance between the extreme right-hand edge of the traveled track and the edge of the slope was probably a foot and a half, and the fence was below the edge of the slope about the same distance; that he examined the old fence, two or three lengths of which were down; that back southerly of the lengths that went down, he looked pretty closely to see whether there were indications of the fence having been scraped by the automobile, but found no such indications; that there came a time when the car was gradually leaving the road, and proceeding in this way (it looked to the witness as though) the right-hand wheel passed against two or three posts just before it tipped over; but there was no evidence seen by the witness indicating that the car hit the fence before it tipped over.

E. H. Meacham was at the place of the accident between 8.30 and 9.00, the next morning. Testifying concerning the tracks supposed to have been made by the decedent's car, he said he thought when the decedent came on top of the knoll at the point of the ledge, he turned a little and ran pretty nearly straight until he got to the culvert or pretty near the culvert, and went off "all at once"; that he did not think the decedent "run more than the bigness of the car off from the road after it began to break." The witness further testified that he examined the fence, but did not see any fresh marks on it southerly any distance from where the car went down; that he saw track was some out of traveled portion of highway, but not as far as the fence; that somewhere between fifty and seventy feet after left traveled portion of road, presume was out of main track three feet; that the margin where the right wheel ran was some of the way dirt and some of the way grass; did not cut in much of any, only just so could track it. Began to cut in when got almost to culvert.

Scott S. McDowell testified to being at the place in question the same evening and shortly after the accident occurred, and to looking over the fence with a flashlight. He stated that back about three lengths from the tile the fence was level with the road, but going along within a length and a half of the tile it was hung out on the edge of the bank; that he examined the fence south of where the car broke it down, and found one post gone, and the boards where the car went over were all decayed; that he examined the fence along back of where the car went down to see whether there were marks on it, and found the length before getting to the tile pipe slightly grazed, which was all the mark there was up till the fence gave way; that there was a very little grass between the fence and the traveled portion of the road as one went onto the culvert, and it was on a slant by the culvert; that back from the culvert the grass was about level with the road, at the culvert it sloped down a foot and a half along a length of the fence, and possibly a little more. This witness also testified concerning automobile tracks seen by him as follows: That they had gradually gone out of the road along the bank for (should say) two lengths and a half of fence, being as straight as a man could run; that they came along "close to the edge of the bank, and the bank simply caved away and let the car directly over, turned bottom side up."

WATSON, C. J. The defendant contends that the culvert in question had no approaches, within the meaning of the law, and consequently the plaintiff must show that the defect which caused the death of the decedent was in the drain pipe itself and not in any part of the dirt highway which extends over it; that, unless the defect was in the pipe itself, it was not an insufficiency of the culvert which caused the accident. But in this contention the defendant fails to recognize the possibility of liability upon the evidence because of an insufficiency of the culvert for want of a railing or guard suitable to the place and conditions. If the cause of the accident was such insufficiency, without any negligence on the part of the decedent contributing thereto, the defendant is liable. *Castle v. Guilford*, 86 Vt. 540, 86 Atl. 804; *Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334.

The evidence particularly shown or referred to in the above statement, was such as to entitle the plaintiff to go to the jury on the question as to whether the decedent's car did not go over

the bank directly above and over the culvert. If the affirmative of this was established as a fact, then the questions raised concerning the approaches to the culvert became immaterial, and the defendant's liability depended upon whether it be shown that the culvert was insufficient for lack of a railing or guard suitable to the place and conditions. On this question the evidence was not all one way, but much of it tended to show such insufficiency, and it was a question for the jury.

The evidence to which reference is made in the preceding paragraph, considered in the light most favorable to the plaintiff, as it must be on questions raised by the motion for a verdict, tended to show, also, that the decedent was in the exercise of the requisite degree of care at the time of the accident, with reference to the place, manner, and speed of driving his car, thus making it a question for the jury to determine.

It is said in particular under this head, however, that the decedent had no right to drive his car (a) because of the condition of his eyes, and (b) because of the condition of the brakes to his car. The only evidence to which our attention is called touching the condition of his eyes is that of a witness who testified that the decedent, in a conversation with her some three or four weeks before the accident, said: "When I meet a car the reflection is so strong on the windshield that it reflects on my glasses, and it bothers me to see the road." And further said he did not know but he would have to stop driving nights, or something to that effect. The declaration quoted contains all there is of force as evidence concerning the condition of decedent's eyes, and the same might truthfully be said by any one wearing glasses when driving an automobile. Yet glasses are so commonly worn by persons engaged in such work as to give the declaration shown, standing alone as evidence on this question, and viewed in its most favorable light for the plaintiff, too slight force to warrant a court in ruling, as matter of law, as here requested. Besides, there was no evidence tending to show that at the time of the accident the decedent's vision was affected in the way mentioned in his previous declaration to the witness.

Concerning the condition of the brakes, the only evidence in the case bearing thereon and noticed in defendant's brief, is the testimony of one Goss, who had charge of the repair shop connected with a garage at St. Johnsbury. He took the decedent's car from the place of the accident to the garage men-

tioned the day after it went over the bank, and repaired it. He testified that he found the brakes loose and he adjusted them, took them up; that they were loose from the natural wear, but nothing serious was the matter with them, and they could be used by allowing for the wear. Yet it could not be said, as a matter of law, that such defective condition of the brakes constituted any part of the cause of the accident; for, as already seen, according to the testimony of several witnesses, the car, at the time of the accident, was running very slowly, and one witness, who saw the car before and at the time it went over the bank, said it "was either running extremely slow or practically at a standstill." This evidence, if believed, shows that the brakes were working well enough so that the decedent had full control of his car all the time until it tipped over the bank, after which the brakes could not have been effective, even though in good working condition.

What we have said in the last paragraph is equally conclusive against the defendant's contentions that a verdict should have been ordered because the decedent was guilty of contributory negligence, in that he violated the statute (P. S. 4094, amended by No. 147, Acts of 1912), in not providing his car with an adequate brake; and that a recovery is precluded by the fact that, though approaching a curve, he did not have his car under perfect control, as required by P. S. 4094 as amended by No. 141, Acts of 1910. Let it suffice that, in view of the evidence, neither question could be ruled as a matter of law.

The fourth ground of the motion, namely, that notice of the accident was not given as required by law, is pressed upon the change in the wording of the statute from what it was when the case of *Eames v. Brattleboro*, 54 Vt. 471, was decided. Then the statute read: "That nothing in this section shall be construed to apply to any case where the person injured shall in consequence thereof be bereft of his or her reason." Acts 1874, No. 51. In the revision of 1894 (V. S. 3493), the statute, by change of wording, was made to read as it now does: "but the provisions in relation to notice shall not apply to a person who in consequence thereof is bereft of reason." It is argued that by this change persons financially injured through the death of their next of kin must give notice the same as they would be required to give if they were themselves physically injured. The absurdity of such a construction is manifest from its logical

result; if a person injured is, in consequence thereof, bereft of his reason, and the injuries result in his death twenty-one days after the occurrence of such injury, no action can be had or maintained, under the statute, for the benefit of the next of kin, because notice was not given within twenty days of the time of the injury, during all which time the injured person was yet alive. An absurd purpose is not to be attributed to the lawmakers, and a construction leading to an absurd consequence must always be avoided. *In re Howard's Estate*, 80 Vt. 489, 68 Atl. 513; *Morse v. Tracy*, 91 Vt. 476, 100 Atl. 923. Moreover, it is not clear that any change in the law was intended; and the rule is, that changes in a revision of statutes will not be regarded as altering the law when it is well settled by plain language in the statute or by judicial construction, unless it is clear that such was the intention. *Clark v. Powell*, 62 Vt. 442, 20 Atl. 597; *Stearns v. Graham*, 83 Vt. 111, 74 Atl. 486.

This in effect disposes of all the substantial grounds argued why a verdict should have been ordered, and the motion was properly overruled.

Judgment affirmed.

TAYLOR, J. (dissenting). I am unable to agree that there is any evidence fairly tending to show actionable negligence. It must be conceded that there was evidence tending to show that the railing as such was defective; that the car went over the bank at a point directly over the culvert, treating the tile drain through the fill as such; and that a suitable guard rail at that point would have averted the accident. Still an important part of the case to establish liability is lacking. In no view of the evidence was the railing a part of the culvert or in any sense appurtenant thereto. All agree that the fill was not an approach to the culvert, so our cases holding towns liable for insufficient guarding of approaches are not in point. As I view it, the evidence tended to show no more than that the fill created such a situation that the statute (G. L. 4534) required the defendant to erect and maintain a suitable railing. But towns are not liable in damages for negligence in this regard. *Moody v. Town of Bristol*, 71 Vt. 473, 45 Atl. 1038. It is only for insufficiency or want of repair of a bridge or culvert that the statute gives a right of recovery. G. L. 4615. That a culvert may be insufficient, in contemplation of the statute, for lack of a railing

or guard suitable to the place and conditions is not questioned, and I can readily agree with the majority that the defendant's liability depends upon whether it be shown that the culvert in question was insufficient in this regard; but I cannot agree that the evidence has any such tendency. I conceive the law to be that, to establish liability, there must be some evidence fairly tending to show that the railing was required to make the *culvert* safe for travelers. I find no evidence connecting the culvert with the accident. The condition of the roadbed was in no way affected by the presence of the tile through the fill. The accident would have happened in the same manner and for the same reasons if the culvert had not been there, or being there, if it had extended to a point outside the limits of the highway. In short, the presence of the culvert is in no way connected with the happening of the accident, and the railing is not shown to have been required because of the culvert, but for a wholly independent reason, as to which there is no liability. I am forced to the conclusion that the defendant's motion for a directed verdict should have been sustained.

POWERS, J., concurs in the dissent.

FRANK A. LARROW v. GEORGE MARTELL AND PAUL D. COBB.

May Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 8, 1918.

Words and Phrases—"Unavoidable Accident—Pure and Simple Accident"—Charge of the Court—Not Error to Charge Specifically on Subject Included in Charge Given—Certified Execution—When Granting of Same Will Not Be Reviewed.

The words "unavoidable accident" and "pure and simple accident," as applied to collisions, exclude the idea of negligence.

Where, in an action for personal injuries received in a collision, the court instructed the jury that if the defendant used the care and

prudence of a prudent man, and therefore was not negligent, the verdict must be for him, it was not error to fail to charge specifically with reference to the law of unavoidable accident, as that subject was necessarily involved in the instructions given. When the evidence, if believed, entitled the plaintiff to a certified execution, this Court cannot revise the action of the trial court in awarding the same.

ACTION OF TORT to recover for personal injuries and property damage. Trial by jury at the September Term, 1917, Windham County, *Stanton*, J., presiding. Verdict and judgment for the plaintiff. The defendant Martell excepted. The opinion states the case.

Herbert G. Barber and Frank E. Barber for the defendant.

Robert C. Bacon for the plaintiff.

WATSON, C. J. This is an action of tort to recover for injuries to person and damages to property. During the course of the trial the case was discontinued as to defendant Cobb, and we hereinafter use the word defendant as referring to Martell only. The verdict was for the plaintiff. The case is here on defendant's exceptions.

The act of defendant of which complaint is made, was done within the limits of the incorporated village of Brattleboro, and at the intersection of Frost, Flat, and Elm streets, which intersection makes four corners, though not all right-angled. Elm street runs northerly and southerly, extending each way beyond such intersection. At approximately right angles therewith is Flat street running easterly, and Frost street running westerly. At the time in question the plaintiff was driving a horse and road cart westerly on Flat street, intending to make a left-about turn within the four corners; and the defendant was operating an automobile on Elm street, going northerly toward and over the crossing of this intersection. When the plaintiff was within the four corners, the exact place being in dispute, the automobile operated by the defendant ran against the plaintiff's cart, resulting in the damage to it, and in the injuries to the plaintiff, complained of. No question as to contributory negligence by

the plaintiff is presented, the exceptions taken to the charge of the court upon that branch of the case not being briefed.

Defendant excepted to the failure of the court to instruct the jury that if this was an unavoidable accident, that is, if it was what is known "as a pure and simple accident," the plaintiff could not recover, even though he received an injury; and in his brief defendant says the court properly instructed the jury on the questions of negligence and contributory negligence as far as it went, but that it did not go far enough, for the law in regard to unavoidable accident, and its application to and effect upon the rights of the parties, were not explained.

To be an unavoidable accident as to the defendant, it must have occurred without any proximate negligence on his part. Exclusive of contributory negligence of the plaintiff, the test of liability is not whether the injury was accidental, but whether the defendant was at fault. *Vincent v. Stinehour*, 7 Vt. 62, 29 Am. Dec. 145; *Judd v. Ballard*, 66 Vt. 668, 30 Atl. 96. The words "mere accident," and "pure accident," have been held to exclude the idea of negligence (*Ulman v. Chicago, etc., Ry. Co.*, 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 945), and we think the words "pure and simple accident," are to be understood as having the same significance.

It appeared that the automobile was provided with a suitable horn for signaling, but the defendant did not give any signal with it, nor with any other device for signaling, when approaching the crossing of the intersection of streets where the collision took place.

The plaintiff's evidence tended to show that he came down on the north side of Flat street, and was west of the center line of Elm street and north of the center line of Flat street, when struck by the automobile; that when the car first came in sight of the plaintiff (and inferentially when the plaintiff's team first came in sight of the defendant), the car was 75 or 80 feet away, was running at a rate of speed from 20 to 30 or 35 miles an hour, and did not slacken in speed before it collided with the plaintiff's cart; that when the car struck plaintiff's team, his horse was standing still or just moving westerly; that, seeing the car coming, the plaintiff raised his left hand and holloed to defendant, and went to gather up his reins to move along, but before he could get his reins gathered up the car struck him; and that, going northerly as was the defendant, there was ample room for

the car to pass on the right-hand (east) side of plaintiff's team, there being a clear space of between 20 and 25 feet, and still be within the limits of Elm street, to say nothing of the further room resulting from the intersection of Flat street.

The defendant's evidence tended to show that the place of the collision was practically in the center of the intersection of Flat and Elm streets, on the east side of the latter; that he was running the car on the east (his right-hand) side of Elm street; that as he came past the building on the corner of Elm street (being the southwest corner of Flat street) he saw the plaintiff just leaving the northwest corner of Flat street (going west), whereupon defendant turned the car to the right and, within a second or two, the plaintiff was struck by the left side of the car; that, on seeing the plaintiff, the defendant slowed down the car as much as he could; that in approaching the crossing, instead of using the horn, he relied upon the noise made by the car as a means of signaling, the muffler cut-out being open and the noise such that it could be heard for a long distance away. Some of the defendant's evidence, including his own testimony, tended to show that in coming along Elm street, and to the time of the collision, the automobile was not running at a rate of speed exceeding ten miles an hour, and that plaintiff's horse was going at the rate of twenty miles an hour; while some of his evidence tended to show that the car was running at a speed not exceeding fifteen miles an hour at the time of the collision, and that plaintiff's team was then standing still, the plaintiff holloing and his arms outstretched. A written statement of the accident, signed by defendant within a week after its occurrence, was put in evidence, in which he stated that he was driving the automobile about twenty miles an hour.

The court charged the jury that the burden of proof was with the plaintiff, and if they found on all the evidence that on the occasion in question, while the defendant was proceeding over Elm street immediately up to, and at the point of, the accident, he used the care and prudence of a prudent man, and therefore was not negligent, their verdict must be for the defendant. As before observed, no fault is found with this part of the charge. It is said, however, that the court should have gone further and instructed the jury with reference to the law of unavoidable accidents. But the law of such accidents was, as to the defendant, involved in the instruction given, that in order to

recover the plaintiff must show negligence on the part of the defendant, and failing this, the verdict must be for defendant. This eliminated the possibility of a recovery if the jury should find an unavoidable accident, and the exception is without merit. In *Sowles v. Moore et al.*, 65 Vt. 322, 26 Atl. 629, 21 L. R. A. 723, the plaintiff sought to recover the value of a pair of horses which were drowned in Lake Champlain, through the alleged negligence of the defendants in not properly guarding an opening in the lake where they had been taking ice near a line of public travel. The plaintiff's evidence tended to show that the horses, when being driven on the lake, became frightened, escaped from the driver, and ran into the opening which was but little guarded. On plaintiff's exception to the charge, the court said the question whether the horses were in such fright and running at such speed that they would have been turned from their course by such guards as reasonably prudent men would have erected, was a material question of fact for the jury to decide before they could say whether defendants' negligence in respect to the guard was the cause of the casualty, and that both questions were involved in the instruction that the plaintiff must make out "that the horses were drowned by reason of the failure of the defendants to properly guard the hole." The judgment was affirmed. In the case of *Flanagan v. Chicago City Ry. Co.*, 243 Ill. 456, 90 N. E. 688, the question here presented was raised by the court's refusal to charge as requested, and a similar holding was had.

Exception was taken to the granting of the motion for a certified execution, on the ground, in short, that the evidence did not warrant the finding by the court that "the cause of action arose from the wilful and malicious act of the defendant, and for wilful and malicious injuries to the person and property of the plaintiff, and defendant ought to be confined in close jail." It is enough to say that the evidence particularly noticed above, if believed in its most favorable light to the plaintiff, afforded a sufficient basis for the finding. Whether the evidence should be so believed was a matter resting wholly with the trial court, and its decision based upon the finding of such facts is not revisable here. *Melendy v. Spaulding*, 54 Vt. 517; *Sheeran v. Rockwood*, 67 Vt. 82, 30 Atl. 689; *Sartwell v. Sowles*, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943.

Judgment affirmed.

TOWN OF BERKSHIRE v. NELSON & HALL COMPANY.

May Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 8, 1918.

G. L. 4394—Resurvey of Highway—Selectmen's Record—Must Show All Jurisdictional Facts—Must Show that Abutting Land Owners Had Notice of Hearing.

The record of a resurvey of a highway under G. L. 4394 must affirmatively show all facts essential to give the selectmen jurisdiction to act in the premises.

If the selectmen have jurisdiction to make a resurvey of a highway, where the resurveyed boundaries are the same as those of the original survey, without giving notice of hearing to the abutting land owners (a question not decided), their jurisdiction is dependent on such facts affirmatively appearing in their record of the resurvey.

The resurvey of a highway is void where the selectmen's record of the same states that the resurvey followed *approximately* the original survey, and fails to show that notice of hearing was given to the abutting land owners.

ACTION OF TORT to recover a penalty under G. L. 4634 for failure to remove certain buildings claimed to be within the limits of a highway. Trial by jury in the St. Albans City Court, *Nathan N. Post*, Judge. Verdict and judgment for the plaintiff to recover \$30 and costs. The defendant excepted. The opinion states the case.

Sheldon R. Boright for the defendant.

Gaylord F. Ladd for the plaintiff.

WATSON, C. J. This action is brought to recover a penalty under section 4048 of the Public Statutes (G. L. 4634), for the alleged failure of the defendant to remove certain buildings claimed to be within the limits of a certain highway in the town

of Berkshire. A trial was had by jury, resulting in a verdict for the plaintiff.

It appeared that prior to 1854 there was a public highway surveyed and established by a county court's commission and the orders of the court, through the towns of Richford, Berkshire, and other towns, to St. Albans; that on May 23 and 24, 1916, the selectmen of the town of Berkshire resurveyed said highway in that town, and on August 16, 1916, made a record of such resurvey in the office of the clerk of the town.

The plaintiff's evidence tended to show that the buildings, for the failure to remove which this action is being prosecuted, consist of two storehouses, each about eighteen feet wide, the older one being sixty-two feet long and the newer one ninety-nine feet long; that these buildings are placed end to end, so as to make practically one building one hundred and sixty-one feet long and eighteen feet wide, extending along the boundary of the highway as shown by the resurvey; and that about one-half of the width of the buildings is within the highway as thus shown. Defendant's evidence tended to show that at the time of the trial of this cause, the older of these buildings had been in its present location for twenty-five years, and that the new building was built onto the other by defendant six years before the trial; that defendant had then been the owner thereof for at least fifteen years, and had been in the occupancy for ten years.

A certified copy of the record of the resurvey, offered in evidence by the plaintiff, was objected to on the ground that the abutting land owners were not given notice of any hearing on the primary question of whether the public good, or the necessity or convenience of individuals, required any relocation or resurvey of the highway, the defendant claiming that the plaintiff must prove that the resurvey established the boundaries of the highway the same as did the original survey, or the resurvey is invalid for want of such notice being given. The evidence was received subject to exception. The same question was raised by exception to the overruling of defendant's motion for a directed verdict at the close of the evidence.

The question thus presented goes to the jurisdiction of the selectmen in making the resurvey. The statute provides that if the survey of a highway has not been properly recorded, or the record preserved, or if its terminations and boundaries cannot be ascertained, the selectmen may resurvey the same and make a

record thereof in the office of the clerk of the town. G. L. 4394.

The record thus required must show affirmatively established all facts essential to give the selectmen jurisdiction to act in the premises. No facts can be presumed in aid of such jurisdiction. *Kent v. Village of Enosburg Falls*, 71 Vt. 255, 44 Atl. 343. The record made shows that the highway was originally surveyed and established as stated above, and that, it being found impossible to determine the termination and boundaries thereof, in that town, the selectmen caused a portion of the highway to be resurveyed, etc.

We need not consider whether notice to abutting land owners of a hearing before the selectmen on any question connected with a resurvey under the statute is essential to jurisdiction in a case where the boundaries as resurveyed are in the same place as the boundaries under the original survey; for the record of the resurvey here in question does not show such fact affirmatively established, as it must if jurisdiction is dependent on it. Thereon the record states only "that the foregoing resurvey follows and approximates the original survey as nearly as the same can be determined." This is too indefinite and uncertain to constitute an affirmative finding of the fact. Notice to land owners was therefore essential to jurisdiction, and, it not appearing from the record that such notice was given, the acts of the selectmen in making the resurvey are void. *LaFarrier v. Hardy*, 66 Vt. 200, 28 Atl. 1030; *Barber v. Vinton*, 82 Vt. 327, 73 Atl. 881.

The reception of the certified copy of record was reversible error. It follows that the plaintiff cannot maintain this action for failure of defendant to remove the buildings from the highway, relying, as it did, upon the resurvey to locate the boundaries, and the motion for a directed verdict should have been granted.

It is unnecessary to consider the other questions presented in argument.

Judgment reversed, and judgment for defendant to recover its costs.

OLIVETTE C. WALKER v. GROVER C. WALKER.

GROVER C. WALKER v. OLIVETTE C. WALKER.

May Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, J.J.

Opinion filed November 11, 1918.

*Divorce—Evidence Sufficient to Support Finding of Adultery—
Discretion of Court—Amendment of Petition—Defence—
Recrimination—Adultery Bar to Divorce.*

In a husband's suit for divorce, evidence that his wife went to dances with one J., that she told her husband she loved J. and was going around with him if she wanted to, that one night she and J. went to a hotel, registered under assumed names, and spent the night in the same room containing one bed, is sufficient, as circumstantial evidence, to support a finding of adultery.

In a wife's suit for divorce on the ground of refusal to support, wherein her husband filed a cross petition on the ground of adultery, it was not an abuse of its discretion, for the court, near the close of all the evidence, to refuse to allow her to amend her petition by setting up intolerable severity as a ground for divorce.

In such a suit, the wife can defend against her husband's petition by way of recrimination, without an amendment of the pleadings.

Adultery by the wife, without condonation, is a bar to her obtaining a divorce on any ground.

PETITION by Olivette C. Walker for a divorce on the ground of refusal to support, and cross petition by Grover C. Walker for a divorce on the ground of adultery. The cases were heard together at the October Term, 1917, Windsor County, *Fish, J.*, presiding. The court dismissed the petition of Olivette C. Walker, and granted a divorce to Grover C. Walker on the ground of adultery. Olivette C. Walker excepted. The opinion states the case.

Herbert G. Barber, Frank E. Barber and C. Menzies Müller
(on the brief) for Olivette C. Walker.

The rule is clearly laid down that the measure of proof of adultery is a preponderance of the testimony, weighing the presumption of innocence in favor of the party accused. *Lindley v. Lindley*, 68 Vt. 421; *Taft v. Taft*, 80 Vt. 256.

The finding of adultery as made is not conclusive, for it will appear upon examination that the whole testimony was clearly and legally insufficient to support the judgment of the court. *Emerson v. Young*, 18 Vt. 603. And will be set aside upon that account. *Burdick v. Champlain Glass Co.*, 11 Vt. 19.

Herbert H. Blanchard and *Herbert G. Tupper* for Grover C. Walker.

If there was any evidence tending to prove adultery, its weight and sufficiency were for the trial court and cannot be revised by this Court. *Taft v. Taft*, 80 Vt. 256; *Kelton v. Leonard*, 54 Vt. 230; *Thayer v. Cen. Vt. R. Co.*, 60 Vt. 214; *Lewis v. Roby*, 79 Vt. 487; *Parsons v. Parsons*, 68 Vt. 95; *Burdick v. Champlain Glass Co.*, 11 Vt. 19.

Adultery may be proved by circumstantial evidence both in civil and criminal cases. The only general rule that can be laid down upon the subject is that the circumstances may be such as will lead the guarded discretion of a reasonable and just man to the conclusion that the alleged act was committed. *Taft v. Taft*, 80 Vt. 256; 2 Bishop on Marriage, Divorce and Separation, Secs. 1351, 1357; *Commonwealth v. Clifford*, 145 Mass. 97; *Thayer v. Thayer*, 101 Mass. 11, 100 Am. Dec. 110; *State v. Brink and Gibbs*, 68 Vt. 659.

It has been uniformly held by this Court that amendments to pleadings are within the discretion of the trial court, and a case will not be reversed on account of the ruling of the trial court unless there has been a manifest abuse of discretion. *Chase v. Watson*, 75 Vt. 385; *Lamoille County National Bank v. Hunt*, 72 Vt. 357; *Burton v. Burton*, 58 Vt. 414; *Bent v. Bent*, 43 Vt. 42.

HASELTON, J. We have here two petitions for divorce tried together in county court and heard together here. Olivette C. Walker petitioned for a divorce from her husband, Grover C. Walker, on the ground of refusal to support. Her petition was denied. Grover C. asked for a divorce from his wife Olivette C. on the ground of adultery. His petition was granted. Olivette

C. brings exceptions. She claims, as the vital question in the cases, that the testimony was not sufficient in law to support the finding by the court of adultery on her part. The testimony is referred to, and it tended to show the following facts: Mr. and Mrs. Walker lived in Springfield in this State. About the latter part of September, 1916, Mrs. Walker became acquainted with one Johnson. Thereafter she went to dances with him at Bellow Falls, Springfield, and Claremont. She ran around with Johnson considerably, told her husband that she hated him and liked Johnson, and that if she felt like going around with Johnson she would. March 17, 1917, Mrs. Walker and Johnson attended a dance at Bellows Falls. From the dance hall they went to the Hotel Rockingham and spent the night in the same room containing only one bed. To bring about this opportunity they registered as man and wife, and the evidence tended to show that both understood how they were registered. Not only did they register as man and wife but they registered under an assumed name. These facts were amply sufficient as circumstantial evidence to support a finding of adultery. *Taft v. Taft*, 80 Vt. 256, 67 Atl. 703, 130 Am. St. Rep. 984, 12 Ann. Cas. 959; *Lewis v. Koby*, 79 Vt. 487, 65 Atl. 524, 118 Am. St. Rep. 984; *Lindley v. Lindley*, 68 Vt. 421, 35 Atl. 349; *State v. North*, 90 Vt. 125, 128, 96 Atl. 702; *State v. Brink*, 68 Vt. 669, 35 Atl. 492.

Mrs. Walker and Johnson both testified, and both admitted staying together in the same bed room at the hotel on the night of March 17, 1917, but both denied having sexual intercourse. They testified that Johnson was taken suddenly ill at the dance in question, and was in great pain, and that thereupon they went to the hotel and registered and occupied the same bed-room during the night, she making cold applications upon him throughout the night as for appendicitis, upon his statement to her that such was his trouble. He testified that he told her he was suffering from appendicitis, but on trial he testified that that was not so, but that he was suffering from stricture following gonorrhea. Evidence was introduced tending to show the improbability of sexual intercourse if his condition was as he claimed it to have been. No one at the hotel was informed of his alleged suffering, no doctor was called. The next morning, without waiting for breakfast, they took the train for Springfield, arriving there at noon or a little after. The following day,

which according to the calendar was Monday, Johnson did a little work, but on the Friday following he went to a hospital in Rutland and was there operated upon. He testified that the operation was for stricture, and was made by an incision through the bladder. After the operation, Mrs. Walker, his companion of the night in question, went to Rutland to be with him, and stayed there three days, visiting him much as a friend, but having nothing to do with nursing him.

Counsel for Mrs. Walker claim that the testimony of Mrs. Walker and Johnson was such that there was really no conflict in the evidence, and no ground for the finding of adultery. But it is no new thing for people charged with crime to deny it, and to invent circumstances to make their denial probable. It was for the court to weigh all the evidence together, and we are convinced and hold that the whole evidence so taken warranted the finding of the trial court as to adultery on the part of Mrs. Walker.

Near the close of all the evidence, counsel for Mrs. Walker moved to be allowed to amend her petition so that it would set up intolerable severity as a ground of divorce. After some discussion the court declined to permit the amendment at the stage to which the cases had progressed. In so ruling the court did not abuse its discretion. Upon this question there is no occasion to cite authorities.

Without amendment of the pleadings it was, however, open to Mrs. Walker to defend against her husband's petition by way of recrimination. *Hemenway v. Hemenway*, 65 Vt. 623, 27 Atl. 609; *Tillison v. Tillison*, 63 Vt. 411, 416, 417, 22 Atl. 531; *Shackett v. Shackett*, 49 Vt. 195.

And without condonation, of which there is no suggestion, the adultery found to have been committed by Mrs. Walker was a bar to her having a divorce on any ground. *Shackett v. Shackett*, *supra*.

We have considered all the exceptions relied on by the excepting party.

The decree dismissing the petition of Olivette C. Walker is affirmed. The decree granting the petition of Grover C. Walker is affirmed.

STATE v. ROBERT WARM.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, J.J.

Opinion filed November 11, 1918.

Criminal Law—Refusal of Instructions—New Trial—Qualification of Juror—Betting on Result of Trial.

In a criminal prosecution, where there was evidence upon which the jury could find the respondent guilty, although the evidence as to who committed the crime was conflicting and circumstantial, a motion by the respondent for a directed verdict was properly overruled.

An exception will not lie to remarks made in argument by counsel for the State which, taken by themselves, appear unwarranted and unfair, where the court treated them as made in reply to statements of respondent's counsel, and where prejudicial error is not shown by the bill of exceptions which is made controlling on that question.

An exception will not lie to the failure of the court to comply in terms with requests to charge, where the court in its own way charged substantially in accordance with the requests.

On a petition for a new trial in a prosecution where respondent was convicted of manslaughter, on the ground of the disqualification of a juror, where it is found that before the trial a juror who sat on the case wagered the cigars that the respondent would be convicted, a new trial will be granted without inquiring whether or not the result of the trial was in any measure affected thereby.

In such case, the amount of the wager is immaterial, the only question at stake being the due administration of justice.

INDICTMENT FOR MURDER. Plea, not guilty. Trial by jury at the September Term, 1917, Franklin County, *Waterman* C. J., presiding. Verdict, guilty of manslaughter, and judgment thereon. The respondent excepted. The respondent subsequently brought a petition for a new trial on the ground of the disqualification of a juror. The opinion states the case.

C. G. Austin & Sons for the respondent.

W. R. McFeeters, State's Attorney, and *R. E. Brown* for the State.

HASELTON, J. At the September Term, 1917, of the Franklin county court, Robert Warm was tried for the murder of Jennie Hemingway, August 12, 1917, and was found guilty of manslaughter. Judgment on the verdict was rendered, sentence was imposed, and Warm is now in confinement.

We have here a bill of exceptions brought by the respondent and a petition for a new trial. In the view we take of the petition for a new trial, we shall not discuss the exceptions at length.

At the close of the evidence the respondent made a motion for a directed verdict in his favor, on the ground that the State had not introduced evidence fairly and reasonably tending to fasten guilt upon him. This motion was overruled, and the respondent excepted.

A careful reading of the entire transcript shows the evidence as to who committed the crime to have been conflicting and circumstantial, but we agree to the contention of the State that the jury had evidence before it upon which it could find the respondent guilty.

The respondent excepted to some remarks made in the argument in behalf of the State. Some of these remarks, taken by themselves, appear unwarranted and unfair, but the court treated them as made in reply to statements of the respondent's counsel, and the narrative contained in the bill of exceptions is such that prejudicial error is not shown. The argument of the respondent's counsel does not appear in the transcript; and while the transcript is made controlling as to matters appearing therein, the bill of exceptions is expressly made controlling as to statements of fact not appearing in the transcript.

The respondent presented several requests to charge, and excepted to the failure of the court to comply in terms with requests 1, 4, and 6. These requests related to the doctrine of presumption of innocence, burden of proof, and reasonable doubt, and particularly to their application in a case standing on circumstantial evidence. However, we think that an analysis of the charge shows that the court in its own way and in fitting

language charged substantially in accordance with the requests. No error appears here.

After verdict the respondent moved that it be set aside for reasons already considered, and on the further claim that it appeared that the jury acted hastily and with passion and prejudice. This motion was overruled, and in the action of the court in that regard there appears no abuse of discretion.

The petition for a new trial brought to this Court, goes upon two grounds; newly discovered evidence and the disqualification of one of the jurors, C. C. Martin, to sit in the case, a disqualification which came to light only after the trial of the case was ended. This juror resided in Montgomery. William Daniels of that town makes affidavit that before the trial Martin said he believed Warm was guilty, knew he was guilty, offered to bet the cigars that Warm would be found guilty, and did make such a wager with Daniels, Martin wagering that Warm would be found guilty, and Daniels wagering that Warm would be found innocent. Joseph LaFrank, road commissioner, makes affidavit that a few days after the trial was over he heard Martin demand of Daniels the payment of the wager. Edmos Larivee makes affidavit to the same effect, and Wallace Lumbra and Elias Roberts make affidavits of like import.

The State took counter affidavits of these men, and LaFrank, Lumbra, and Roberts make affidavit that the talk in which Martin demanded of Daniels payment of the wager was of a jovial character. Larivee's counter affidavit is to the effect that he heard the bet, and that it was the other way; Martin betting that Warm would go free. Larivee's affidavits are unreliable, and really count for nothing. The counter-affidavit of Daniels was taken by the State. In it Daniels deposes that Martin said he knew well enough that Warm was guilty. Daniels said that, so far as he was concerned, he was in earnest in respect to the wager, as he believed Warm was innocent, would have bet the cigars, or would have bet a dollar. However, he says he never dreamed the bet was coming up to hurt Martin, and that no doubt the matter was all fooling. Previous to the wager he talked with Martin about the case right along as the newspapers came out, and their divergent views, based on what they read, led to the wager.

In this state of the affidavits of others we turn with interest to the counter affidavit of the juror himself taken by the State,

for an unqualified denial by Martin of the subject-matter of the other affidavits would go far to sustain the contention of the State. Juror Martin makes affidavit that at the time he was examined on the *voir dire* he had no recollection of discussing the death of Jennie Hemingway with Daniels, nor of making any wager with regard to parties concerned. He does not deny that he sat in the case with a consciousness that he had wagered that Warm would be convicted, but says that he tried the case fairly upon the evidence given in court and the charge as he understood it, and without reference to anything that he had heard, read, said or done theretofore. He does not deny that he made the wager referred to, but says that, if any wager was made, it was merely a joking bet, not based upon anything tangible, and promptly forgotten. He further says that, after he returned home from the trial, Daniels was joked about a wager, which the latter had made and lost, on the weight of horses, and that, if there was ever any talk about the wager in question, it was then had; that the existence of such a wager was never mentioned again; that it was never paid to him nor demanded by him.

Now if he didn't remember making the bet, he didn't remember forgetting it, nor that it was of a joking character. And if he didn't remember that there was any talk about it after the trial, he didn't remember the connection of the talk with talk about another wager. We are obliged to say that the affidavit of juror Martin is evasive and lacking in candor, and we find on the affidavits of others that he made the wager that Warm would be convicted. Very shortly thereafter he sat as one of the jury that convicted Warm. The counter affidavits, giving color to the claim that the wager was of a joking character, are without weight. Many people regard betting as fun, and the fact that the juror regarded it as a joke to bet on the conviction of a man charged with murder does not commend him to us as a man fit to be jurymen in a case in which he had made that kind of a wager.

A grave question of public policy is here involved and it admits of but one answer. The amount of the wager in this instance is immaterial to the answer. Courts will not consider how large a wager must be to disqualify the wagerer. Public policy will not permit verdicts to stand which are rendered by jurymen who have bet on the issue, be the stake great or small. It is not for us to inquire whether or not the result of the trial was in any measure due to the situation that existed. The due

administration of justice is the question at stake. *Austin & McCarger v. Langlois*, 81 Vt. 223, 69 Atl. 739; *Moore's Admr. v. Cross*, 86 Vt. 148, 84 Atl. 22; *In re Ketchum*, 92 Vt. 281, 102 Atl. 1032.

The conclusion reached makes it unnecessary and inadvisable to comment on the newly discovered evidence as set forth by petition and affidavit. On the new trial which public policy demands, such evidence, and all available evidence, whether favorable or unfavorable to the respondent, will stand for careful, impartial, and solemn consideration.

Petition for new trial granted.

J. H. GAINES v. R. N. BALDWIN.

May Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, and TAYLOR, JJ.

Opinion filed November 11, 1918.

Petition for New Trial—Where Judgment Below Reversed on Single Issue—When Granted.

The application of the general rule, that where error inheres in a single issue the Court will grant a retrial on that issue alone, rests in the sound discretion of the Court to be applied with caution to the furtherance of justice.

The rules governing petitions for new trials do not necessarily obtain in a case where a retrial has been granted on a single issue, and, in such case, if, on suggestions made by counsel at the time of the decision by this Court, or by a petition for a new trial thereafter seasonably brought, it appears that justice will be promoted by an unrestricted trial of all the issues in the case, the same will be granted.

In an action for malpractice, where the judgment for the plaintiff was reversed on the question of damages only, and the affidavits of newly discovered evidence attached to a petition for a new trial on all the issues in the case, tended to show that the defendant

was not responsible, in whole or in part, for the plaintiff's crippled condition, and such evidence would necessarily be admissible on the question of damages; *held*, that the ends of justice would be subserved, by enlarging the reversal and ordering a new trial without restriction.

ORIGINAL PETITION for an unrestricted new trial, on the ground of newly discovered evidence, in the case of *R. N. Baldwin v. J. H. Gaines*, in which there was a judgment for the plaintiff in the court below, and which judgment was affirmed by the Supreme Court on the question of liability, and reversed as to damages. 92 Vt. 61. The opinion states the case.

W. W. Reirden and E. A. Cook for the petitioner.

Frank D. Thompson and J. R. Searles for the petitionee.

HASELTON, J. The case of *Baldwin v. Gaines* for malpractice was tried in the county court at the September Term, 1916, and the plaintiff had judgment. The case came to this Court on exceptions, and at our October Term, 1917, the judgment was reversed as to damages, and the cause was remanded for a new trial on that question only. *Baldwin v. Gaines*, 92 Vt. 61, 102 Atl. 338.

We have here a petition for an unrestricted retrial. We are informed by the brief of the petitioner that the remanded case has been continued in county court pending the determination of this petition for an enlargement of the reversal.

Until about nine years ago it was the practice on reversal and remand for prejudicial error to grant a new trial on all questions and issues. But during the time just mentioned it has been considered that where the error inheres in a single issue, the ends of justice are in general met by a new trial of that issue alone. *Marshall v. Dalton Paper Mills*, 82 Vt. 489, 74 Atl. 108, 24 L. R. A. (N. S.) 128; *Austin v. Langlois*, 83 Vt. 104, 74 Atl. 489; *Kennett v. Tudor*, 85 Vt. 190, 81 Atl. 633; *Griffin v. Boston & Maine Railroad*, 87 Vt. 278, 89 Atl. 220; *Green v. La-Clair*, 89 Vt. 346, 95 Atl. 499; *Cross v. Passumpsic Fibre Leather Co.*, 90 Vt. 397, 98 Atl. 1010; *Ryder v. Last Block Co.*, 91 Vt. 158, 99 Atl. 733; *Adams v. Cook*, 91 Vt. 281, 100 Atl. 42.

The practice has become the general rule, but the rule is to

be applied with caution with a view to the furtherance of justice, and whether or not it shall be applied is always a matter within the sound discretion of the Court. *Griffin v. Boston & Maine Railroad*, 87 Vt. 278, 89 Atl. 220; *Carpenter v. Central Vermont Ry. Co.*, 90 Vt. 35, 96 Atl. 373, 20 R. C. L. 222.

At the time of a decision requiring a new trial on one issue, suggestions may be made by counsel to the effect that justice will be promoted by an unrestricted trial of all questions in the case. *Griffin v. Boston & Maine Railroad*, *supra*.

It follows that where, as here, a petition is seasonably brought for the enlargement of a reversal, the rules governing petitions for new trials in general do not necessarily obtain.

The rule here should be somewhat as flexible as the rule that where a case comes before us on findings of facts, if a reversal is had, judgment will here be rendered such as the trial court should have rendered on the facts found. *Reynolds v. Bean*, 91 Vt. 247, 99 Atl. 1013; *Phillips v. Cutler*, 89 Vt. 233, 95 Atl. 487; *Davis v. Davis' Estate*, 48 Vt. 502; *Smith v. Hill*, 45 Vt. 90, 12 Am. Rep. 189.

The defendant to this petition resided in Irasburg and was injured in an automobile accident at Newport. He suffered a fracture of the right femur or thigh bone. The petitioner, Doctor Gaines, was one of the physicians who set the bone, and he attended Baldwin as his surgeon at Newport for about three weeks, when the patient was removed to his home in Irasburg. Doctor Templeton, of Irasburg, was the family physician of the Baldwins, and one of the issues in the case was whether after the removal of Baldwin to Irasburg the latter was under the care of Doctor Templeton or of Doctor Gaines as attending physician and surgeon.

Upon this important question the affidavits of newly discovered evidence attached to the petition have a very considerable bearing. The affidavits also have some bearing upon the question of whether or not the deformity in Mr. Baldwin's right leg (it is now about two and one-fourth inches shorter than the other) resulted from his own imprudence. If this were a petition to open litigation that has been ended we might not be able to say that the affidavits are sufficient for that purpose. And we might have difficulty in holding that the affidavits of diligence are specific enough. *Gilfillan v. Gilfillan's Estate*, 90 Vt. 94, 96 Atl. 704; *Usher v. Allen*, 89 Vt. 545, 95 Atl. 809; *Willard v. Nor-*

cross, 86 Vt. 426, 85 Atl. 904; *Ploof v. Putnam*, 83 Vt. 494, 76 Atl. 145; *Flint v. Holman*, 82 Vt. 513, 74 Atl. 232; *Hemmenway v. Lincoln*, 82 Vt. 465, 73 Atl. 1073; *Lucia v. State*, 77 Vt. 279, 59 Atl. 1016; *May v. State*, 77 Vt. 330, 60 Atl. 1.

But here the question is not whether there shall be a new trial, but relates to the scope of such trial. Much of the newly discovered evidence will necessarily be admissible on the question of damages, for the petitioner can be held liable only for injuries attributable to his fault. *Mullin v. Flanders*, 73 Vt. 95, 50 Atl. 813; *Hathorn v. Richmond*, 48 Vt. 557; *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338.

We think it will subserve the ends of justice, and will consist with the rules governing new trials in general, to enlarge the reversal upon the showing made and order a new trial without restrictions. Having reached this conclusion, we purposely refrain from a detailed comment upon the affidavits, and from expressing an opinion as to the probable result of an unrestricted new trial, as we ordinarily do when we have under consideration a petition for a new trial which looks to the renewal of litigation once ended.

Petition granted.

MILES, J., did not sit.

DODGE BROTHERS v. CENTRAL VERMONT RAILWAY COMPANY.

May Term, 1918.

Present: WATSON, C. J., HASLTON, POWERS, TAYLOR, and MILES, J.J.

Opinion filed November 11, 1918.

Railroads—G. L. 5195—Fences—Gates Therein—Proof of Negligence—Stock on Track—Question for Jury—Keeping Gate Closed—Supplemental Instructions—Exceptions.

Where the evidence is equally consistent with the existence or non-existence of liability by the defendant, it is error to submit that question to the jury.

In an action for damages for colts killed on the defendant's railroad, that had escaped through a gate in a fence which the defendant,

under P. S. 4453 (G. L. 5195), was bound to maintain for the plaintiffs, the question whether a loose hook on the gate, which might be displaced by the switch of a tail or rubbing of a nose, was the proximate cause of the gate being open and the colts escaping, was, under the circumstances, for the jury.

Evidence that persons were seen near a gate has no tendency to show that they used it.

It is error to submit to the jury a basis of recovery not alleged in the declaration.

Under G. L. 5195, making it the duty of a railroad to maintain a sufficient fence, it is the duty of the land owner, for whom the fence is maintained, to keep a gate therein closed; and it was error for the court to charge the jury that the defendant's failure to keep the gate closed would amount to a failure to maintain a sufficient fence at that point.

The fact that such a gate was found open is not enough to impute negligence to, or establish liability on the part of, the railroad company.

When a supplemental instruction is given on a point excepted to in the original charge, the exception must be renewed or the supplemental instruction will be regarded as satisfactory, and the error, if any, cured.

When a supplemental instruction is merely a reiteration of the point excepted to in the original charge, the excepting party is entitled to the benefit of his original exception, although he failed in his attempt to renew it.

CASE FOR NEGLIGENCE. Plea, the general issue. Trial by jury at the September Term, 1917, Washington County, *Slack*, J., presiding. Verdict and judgment for the plaintiffs. The defendant excepted.

The negligence complained of was that the defendant neglected to construct and maintain a gate sufficient "to keep said colts or horses from entering upon the right of way of the defendant, in that the latch of said gate, whereby it was hooked and closed, was fastened to the pasture side of said gate and was loose." The opinion states the other facts in the case.

John W. Redmond and *Charles F. Black* for the defendant.

When the evidence is equally consistent with either view—the existence or nonexistence of negligence—it is not competent

for the judge to leave the matter to the jury. The party who affirms the negligence has failed to establish it. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. *Bailey on Personal Injuries*, § 1672; *Manning v. Ins. Co.*, 100 U. S. 693, 698, 25 L. ed. 761; *United States v. Ross*, 92 U. S. 281, 284, 23 L. ed. 707; *Welshausen v. The Charles Parker Company*, 83 Conn. 231; *Delaware & Hudson Co. v. Ketz*, 233 Fed. 31; *Kruck v. Connecticut Co.*, 84 Conn. 403; *Lopez v. Campbell*, 163 N. Y. 347; *White v. Lehigh Valley R. R. Co.*, 220 N. Y. 135; *Smith v. First Nat. Bank*, 99 Mass. 605; *Cotton v. Wood*, 8 C. B. N. S. 568; *Toomey v. Brighton, etc., R. R. Co.*, 3 Id. 146; *Baulec v. Harlem R. R. Co.*, 59 N. Y. 356; *Smith v. Illinois Cent. R. R. Co.*, 200 Fed. 555; *Pittsburgh, etc., Ry. Co. v. Scherer*, 205 Fed. 358.

S. Hollister Jackson and John W. Gordon for the plaintiffs.

POWERS, J. During the night of September 30, 1915, five colts belonging to the plaintiffs escaped from the pasture adjoining the defendant's railroad by passing through an open gate onto the track, and were there killed by the defendant's train. It was conceded below that the value of the colts was \$700, and after the trial a plaintiff's verdict for that amount was returned. At the close of the evidence, the defendant moved for a verdict on the grounds: (1) That there was no evidence in the case tending to show that any faulty construction of the gate or its appurtenances was the proximate cause of the injury complained of; (2) that there was no evidence in the case tending to show how, when, or by whom the gate was opened so as to allow the colts to escape; (3) that, assuming that the evidence warranted an inference that the gate and its appurtenances were improperly constructed, there was no evidence in the case tending to show that such defects were the proximate cause of the injury complained of; and (4) it was not permissible to allow the jury to act upon mere surmise or conjecture in determining how the gate was opened. This motion was overruled and the defendant excepted.

By P. S. 4453 (G. L. 5195), the defendant was required to build and maintain a good and sufficient fence between the road and the plaintiffs' pasture. The gate through which the colts escaped was a part of the fence so required, and it was the de-

defendant's duty to keep it and its appurtenances "good and sufficient." This is admitted. There was evidence tending to show that the device provided and used to keep the gate closed—a hook and staple—was insufficient and inadequate; that the hook was so loose in the staple that it was easily unhooked, and might be displaced by the whisk of a tail or rubbing of a nose. But this alone was not enough to charge the defendant with liability. The plaintiffs were required to go one step further, and show by a fair preponderance of evidence that the defects referred to were the proximate cause of the escape of the colts. On this subject the jury is not to be allowed to speculate; and if the evidence is equally consistent with the existence or nonexistence of liability, it is error to leave the question to the jury at all. In order to sustain the verdict, there must be found in the record evidence fairly and reasonably tending to show that the escape of the colts resulted from the defects shown. The law does not require, however, that this fact be established by direct evidence. Circumstantial evidence may be resorted to, and, if it is of the requisite character and force, it is sufficient. It must be admitted that the circumstances here relied upon to show that the colts themselves unhooked this gate in some such way as stated above and then pushed it open, are not of a very decisive character; but it cannot be said that they are not sufficient to create a legal tendency, or to sustain a jury inference.

One of the plaintiffs testified that the gate was closed at about five o'clock of the day before the accident. The character and location of the pasture made it improbable that any person would have occasion to use the gate between that time and the time when the colts were killed. The character of the soil inside the gate was such that foot prints would naturally be discoverable if a person had passed through the gate during or about the time named. No such tracks were to be seen, though the ground was examined the next morning. In these circumstances, the question of the proximate cause was for the jury. It is true that one of the trainmen testified that he went through the gate into the pasture immediately after the accident, and that his tracks were not seen by the witnesses who examined the place. But this is not conclusive against the plaintiffs, and was nothing more than a circumstance to be weighed and considered by the jury. The suggestion that the evidence shows that third persons made use of the gate is without force. The evidence coming

nearest to this was that showing that persons were seen on the track near by. But this had no tendency to show that they made any use of this gate.

The defendant excepted "to that part of the charge in which the court held that the defendant was under a legal duty to keep the gate closed." In connection with this exception, the defendant insisted that if it had built and maintained a good and sufficient fence, including the gate and its fastenings, it had discharged its full duty and was under no obligation to see to it that the gate was kept closed.

Any reference to this duty was outside the issue. The only insufficiency in the fence or gate charged in the declaration was that "the latch of said gate, whereby it was hooked and closed, was fastened to the pasture side of said gate and was loose." There was no allegation suggesting that the defendant was at fault in any other respect. So no other shortage of duty was involved. *Seeley v. Cent. Vt. Ry. Co.*, 88 Vt. 178, 92 Atl. 28. The rule is that it is error to submit to the jury a basis for recovery outside the pleadings. *Smith v. C. V. Ry. Co.*, 80 Vt. 208, 67 Atl. 535. But the exception to this instruction was not put upon this ground, but upon the ground that it embodied an erroneous statement of law. The court did not charge in express terms that it was the defendant's duty to keep the gate closed; but it was the plain import of the instruction that this duty rested on the defendant, and that its failure therein would amount to a failure to "maintain" a sufficient fence at that point. This view is supported by courts of great respectability. Nevertheless we do not think it is sound. The gate was provided for the use and benefit of the plaintiffs. The defendant made no use of it and derived no advantage from it. We cannot regard an open gate as an insufficiency in the fence. If it and its fastenings were "good and sufficient" within the meaning of the law, the duty of keeping it closed was upon the plaintiffs, and the fact that it was found open is not enough to impute negligence to or establish liability on the part of the defendant. This view seems to be supported by the weight of authority and harmonizes better with our statutory provisions. *Megrue v. Lennox*, 59 Ohio St., 479, 52 N. E. 1022; *Swanson v. Chicago, M. & St. P. R. R. Co.*, 79 Minn. 398, 82 N. W. 670, 49 L. R. A. 625; *Adams v. Atchinson, T. & S. F. R. R. Co.*, 46 Kan. 161, 26 Pac. 439; *Diamond Brick Co. v. N. Y. Cent. & H. R. R. Co.*,

55 Hun. 605, 7 N. Y. Supp. 868. See, also, other cases cited in note to *Swanson v. Chicago, etc., R. R. Co.*, 49 L. R. A. 625.

The instruction was manifestly harmful, and the exception to it will have to be sustained unless it was waived or vitiated by what followed. After the exception was taken, the court gave a supplemental charge on this and other subjects. At the close of this supplemental charge, the defendant attempted to except, saying merely, "May our exception be noted to the supplemental charge?" To which the court replied, "Yes." It is apparent that this exception was not sufficiently explicit to be available, for it did not point out which of the several matters covered it referred to. The general rule is that, when a supplemental instruction is given on a point excepted to in the original charge, the exception must be renewed or the supplemental instruction will be regarded as satisfactory and the error, if any, cured. *Davis v. C. V. Ry. Co.*, 88 Vt. 460, 92 Atl. 973. But here the supplemental charge was not a correction or modification of the original charge, but a reiteration of it. In the circumstances shown, the defendant is entitled to the benefit of his original exception, though it failed in its attempt to renew it.

Judgment reversed and cause remanded.

IN RE ESTATE OF ANDREW J. BARRON.
MARY A. FREEMAN, CLAIMANT.

May Term, 1918.

Present: WATSON, C. J., POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 19, 1919.

Bills and Notes—Evidence—Opinion Evidence—Handwriting—Standard of Comparison—Harmless Error—Excepting Party Putting in Similar Evidence—Cross-examination—Court's Discretion—Immaterial Evidence—Declarations of Agent—Parol Evidence that Maker Signed Note as Agent—Instructions—Presumption of Innocence—Credibility of Party as Witness—General Exception.

In an action on a note alleged to have been signed by the defendant's intestate, a witness, who for several years saw letters purporting to be personally signed by the intestate, and, in the discharge of his duties, answered them and acted upon them as the intestate's letters, of which the latter must have known and acquiesced therein, is qualified to testify that in his opinion the signature to the note is in the handwriting of the intestate.

In such case, the signature to official reports which the witness testified, in his opinion, to be in the handwriting of the intestate, are admissible as standards of the latter's signature.

Error in the admission of evidence is rendered harmless by the other party later putting in evidence of the same subject-matter.

It is in the court's discretion to permit a witness on cross-examination to be asked, for the purpose of affecting his credibility, whether he had been convicted of selling liquor without a license.

In such case, it not appearing otherwise, the Court will consider the ruling excluding such evidence as made in the trial court's discretion.

Declarations of an agent were properly excluded, it not appearing when the declarations were made nor that they were made while the agent was performing some act within the scope of his agency and with reference to the act which was being done.

In an action on a priest's note, defended on the ground that he did not sign it, and where no claim was made against the parish, evidence

that he did not report the note as an indebtedness of the parish was properly excluded.

Where a note on its face appears to be the personal undertaking of the party signing it, in a suit on the note against his estate, it cannot be shown by parol evidence that he in fact signed it as agent for a third person, to the knowledge of the payee.

In an action on a note, defended on the ground of forgery, an instruction, that the plaintiff was presumed to be innocent of the crime of forgery, and that this presumption was a piece of evidence in her favor to be weighed in connection with the other evidence in determining whether the intestate signed the note which was to be determined on the whole evidence, sufficiently excluded the idea of conclusiveness in the presumption of innocence.

In such case, an instruction to the jury, that "It is immaterial when this note was signed, if it was signed by A. J. Barron, the defendant's intestate," was without error.

Where the defendant called the plaintiff as a witness, a general exception to an instruction to the jury, that the defendant was not bound by her testimony, "but her testimony is to be weighed as that of all witnesses called in behalf of the defendant, giving it its due weight," does not cover the specific claim that the instruction disregarded the plaintiff's interest and bias, as an adverse party, in testifying.

APPEAL from the disallowance by the commissioners on the estate of Andrew J. Barron of a claim presented by Mary A. Freeman. Declaration, assumpsit on a note. Plea, the general issue with notice denying the execution of the note. Trial by jury at the December Term, 1915, Bennington County, *Butler*, J., presiding. Verdict and judgment for the claimant. The estate excepted.

D. A. Guiltinan and Holden & Healy for the estate.

The admissions or declarations of an agent are admissible when shown to have been made in respect to a matter within the scope of his employment or while engaged in the business of his principal. *Barnard v. Henry*, 25 Vt. 289; *Taplin & Rowell v. Marcy*, 81 Vt. 428; *Hayward Rubber Co. v. Dunklee*, 30 Vt. 29; *Baldwin v. Doubleday*, 59 Vt. 7.

The rule that interest affects credibility has been applied in a great many instances to the testimony of parties and to that of ordinary witnesses and this right to show the interest of the witness exists independent of statute. *Moore on Facts*, Chap. 20, Vol. 2, p. 1224; *Hutchinson v. Wheeler*, 35 Vt. 330; *McKindley v. Drew*, 69 Vt. 210; *Raymond's Admr. v. Rutland Ry. L. & P. Co.*, 90 Vt. 373.

A party does not become his adversary's witness when the latter calls him. *Suter v. Page*, 64 Minn. 444, 67 N. W. 67.

J. J. Enright, F. C. Archibald, J. K. Batchelder, and R. E. Brown for claimant.

WATSON, C. J. The claimant seeks to recover of the estate of A. J. Barron the amount of a promissory note dated January 2, 1909, payable on or before five years after date with interest annually at the rate of five per cent. The note purports to be signed by A. J. Barron, the defendant's intestate. The case came into county court on appeal from the report of the commissioners disallowing the claim against his estate and the order of the probate court approving the same. Defendant pleaded the general issue, and by notice put in issue the execution of the note. A trial was had by jury, resulting in a verdict for the plaintiff, and judgment was entered on the verdict.

The plaintiff's evidence tended to show that prior to January 2, 1909, the intestate had given her two similar notes, one dated January 2, 1899, and one dated January 2, 1904, the second being in renewal of the first, and the note in suit, in renewal of the second.

It appeared that A. J. Barron was the priest of the Roman Catholic Church at Richmond, this State, from 1884 up to about May, 1891, and of the St. Francis de Sales Church at Bennington from 1892 to 1912. He is often referred to by witnesses in giving testimony, and also in this opinion, as "Father Barron."

Rev. Joseph F. Gillis, called as a witness by the plaintiff, testified that he had been stationed at Burlington as a priest of the Roman Catholic Church during the past eighteen and a half years; that shortly after his arrival there he became personally acquainted with Father Barron and occasionally corresponded with him in connection with the witness's duties, about matters referred to in the correspondence; that when there was business to

be transacted, Father Barron wrote concerning it and the answers of the witness went back, which would happen sometimes every week, sometimes once a month, and possibly sometimes not so often; that witness could not say positively that he ever saw Father Barron write; that a record is supposed to be made annually by the priests of the churches of the Diocese of Vermont, and usually is, though once in a while it may happen that a priest does not send in a report; that by a regulation of the church society or organization, blanks for such reports are sent out from the Bishop's house at Burlington, usually in December, to the priests of the diocese who have a parish, and they are supposed to be filled out and returned in the early part of the following January, and when returned they are put on file; that usually the name of A. J. Barron was affixed in handwriting to the letters received from him, though sometimes it was in typewriting; that the witness has no way of saying positively that A. J. Barron signed the letters (signed in handwriting), although it was taken that he did, and the witness supposed in each case that it was the signature; that the witness is so familiar with Barron's handwriting and his signature that he has an opinion as to whether the signature shown him is Barron's signature or not.

The original records of St. Francis de Sales Church at Bennington from 1892 to 1912 being produced in court, the witness testified that they came by mail from Father Barron, at least supposed to come from him at Bennington; that the witness found them in the archives of the diocese, at Burlington, the place where those records are usually kept; that at the time those reports were received at the diocese, the witness was secretary and chancellor of the diocese, and as such, in the performance of his duties, he usually received the letters sent to the Bishop by the different priests, and answered a great many of them. The witness was then shown the reports mentioned for the years from 1892 to 1912, except for the years 1908 and 1911 which contained only typewritten signatures, and was asked to state in whose handwriting the signature A. J. Barron on each one of them is, in his opinion. Counsel for plaintiff stated that if these signatures are proved as in the handwriting of A. J. Barron, he offered them as standards. Subject to exception, the witness answered that in his opinion it is the handwriting of Father Barron. The stated ground of the exception was that there had been no basis laid upon which the witness could give

such testimony, the only witness who can pass an opinion as to the signature upon papers he has not seen written is an expert.

This exception is not well taken. The testimony of the witness shows that he had seen letters purporting to be subscribed by the intestate in his own handwriting, and that, by way of answering these letters, the witness personally communicated with the intestate concerning the subject-matters thereof and acted upon them as his letters, of which the latter must have known by the answers he received, and acquiesced therein; also, that the reports received from the St. Francis de Sales Church, purporting to be signed in writing by the intestate, were habitually submitted to or seen by the witness in his official relation to the diocese. Upon this evidence the witness is deemed to be acquainted with the handwriting of the intestate, and there was no error in the ruling made. *Redding v. Redding's Est.*, 69 Vt. 500, 38 Atl. 230; *State v. Kent*, 83 Vt. 28, 74 Atl. 389, 26 L. R. A. (N. S.) 990, 20 Ann. Cas. 1334. Such acquaintance with the intestate's handwriting being shown, the witness was properly permitted, against exception on the same ground, to testify that in his opinion the signature to the note in question (plaintiff's Exhibit 1) is in the handwriting of the intestate. For this holding, the two cases cited above are full authority. And the signatures on the reports mentioned, when established by such evidence, could properly be received as standards. *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *State v. Ryder*, 80 Vt. 422, 68 Atl. 652.

What we have said in overruling the exception saved in connection with the testimony of the witness Gillis, and the admission of the records mentioned therein, is controlling as to the similar questions raised in connection with the testimony of the witness Claremont, and the reception of plaintiff's Exhibits 159, 160, 161, and 162, and the latter questions need not be further noticed.

Subject to exception on the ground of incompetency and irrelevancy, the plaintiff was permitted to show by Mr. Justice Haselton that in 1898 or 1899, some three or four years before his appointment to the bench, he received a draft or check from a life insurance company, payable to the plaintiff for \$5,000, and that he handed it to her in his office at Burlington. It is urged that this evidence was erroneously received. We may assume this to be so, and yet the defendant was not harmed by it; for

in defence of the action defendant called the plaintiff to testify as a witness in its behalf, and examined her at great length on, among other things, where her money was just before she let the intestate have the \$6,000 on the original note. In that connection and in answer to questions asked by defendant's attorney, she testified that her husband had given her \$5,000; that she had the money in her house, in all \$11,000; that she received \$5,000 from an insurance company the last of December, that Justice Haselton got for her. Later in the course of the same examination, in answer to further questions, she stated what company paid this insurance money, on whose life it was, and that there was another policy on the same life, in another company (naming it), payable to her. She further said that she held the draft for \$5,000 until the following April, before getting it cashed, calling it money all the time. The defendant having thus put the foregoing evidence into the case, it is clear that the evidence given by Mr. Justice Haselton, though it be considered as improperly received, was harmless. *Townshend v. Townshend*, 84 Vt. 315, 79 Atl. 388; *Lynch's Admr. v. Central Vt. Ry. Co.*, 89 Vt. 363, 95 Atl. 683.

This is also conclusive as to the question raised by the fifth exception. Edward W. Freeman, the stepson of the plaintiff and called by her as a witness, testified that within two or three years, or three or four years, of his father's death (which occurred in 1901), the plaintiff showed him a certain paper one day on the train going from Burlington to Richmond. Subject to exception on the grounds that it was immaterial, irrelevant, and incompetent, the witness answered that it was a draft or check, should say right in the neighborhood of \$5,000. He further testified that he did not notice to whom it was payable, or if he did, he had forgotten. The defendant moved that this testimony concerning the paper be stricken from the record as immaterial, it not being shown that the draft or check was payable to the plaintiff. The motion was overruled and exception noted. Treating this evidence as wrongly received, it was harmless to the defendant for the same reason as was that given by the preceding witness, and the exception is unavailing. The same thing is true as to the exception to the refusal of the court to strike out the testimony of this witness, to the effect that his father, prior to his death, distributed his estate to his wife and his children, the witness saying in cross-examination that, other

than what was given to himself and to one brother, his knowledge of such distribution consisted in what was said "as we talked matters between ourselves, just as you would family affairs." The only purpose of this evidence was to show that the plaintiff had money at the time when (she says) she made the loan to the intestate. In this instance as in the two preceding, and for the same reason, if error was committed no harm resulted therefrom.

The same witness was asked in cross-examination whether he had been convicted of selling liquor without a license. On objection being made, the evidence was excluded and exception noted. Whether such evidence should be received as affecting the credibility of the witness, was a matter resting in the discretion of the trial court. *State v. Shaw*, 73 Vt. 149, 50 Atl. 863; *McGovern v. Hays & Smith*, 75 Vt. 104, 53 Atl. 326. And it not appearing otherwise, the ruling will be taken as so made. *Gilfillan v. Gilfillan's Est.*, 90 Vt. 94, 96 Atl. 704.

Defendant offered to show by E. C. Bennett that Mr. Enright, the attorney and representative of the plaintiff, said in Bennington prior to the meeting of the commissioners on the intestate's estate, that the plaintiff told him that the intestate came to Richmond about the time of the expiration of the term for which one of the notes was written and paid her in cash five years' interest, and \$1,000 on the principal, at the same time giving her a new note for \$5,000; and that Enright then had the note in suit in his possession. Exception was saved to the exclusion of the offer. How long prior to the meeting referred to those declarations were made, the offer did not disclose. It may have been days, weeks, or months. Nor did the offer indicate that they were made while Enright was performing some act within the scope of his agency, and with reference to the act which was being done. *Barnard v. Henry*, 25 Vt. 289; *Baldwin v. Doubleday*, 59 Vt. 7, 8 Atl. 576; *Taplin & Rowell v. Marcy*, 81 Vt. 428, 71 Atl. 72; *First Nat. Bank v. Bertoli*, 87 Vt. 297, 89 Atl. 359, Ann. Cas. 1917 B, 590.

Defendant offered the parish records which were produced by the witness Gillis for the years 1899 and 1900, for the purpose of showing that Father Barron did not report the original note as an obligation of the parish, and to their exclusion an exception was saved. Counsel then added to the offer, that the reports would show a list of individual owners of listed debts against the

parish, and the total in each case accounted for by individual names, and that this note does not appear among them. Again the offer was excluded and exception saved. These offers seem to have been made because the plaintiff, as a witness in behalf of defendant, stated (in answer to the question as to how she happened to loan the \$6,000 to Father Barron in 1898) that "he said he was in debt up to his neck in Bennington and wanted a good deal of money for the parish, he was paying six per cent. for money; he knew I had money, and if I would give it to him he would pay me five per cent." Later, being asked, "At the time you loaned the \$6,000, you understood that it was for the use of the Bennington parish?" she stated: "Well, I understood it that way, but of course you don't always take things just right." She testified that the note then given was signed by Father Barron and by Bishop Michaud.

No claim is made against the parish in this action, and whether the original note was reported by Father Barron as an obligation of the parish was immaterial to any issue in the case, and the addition to the offer did not make the evidence any more material. It had no tendency to show that he did not sign the note in question, and was properly excluded.

At the close of the evidence the defendant moved for a directed verdict in favor of the estate, on the grounds that it appeared by the plaintiff's testimony that the original indebtedness was incurred for the benefit of the parish at Bennington, and she was told that the money was for the use of the parish; that the Bishop's signature was on the original note and on the renewal of 1904, and when the note in suit was given she requested Father Barron to have it signed by the Bishop when one should be appointed; that the last two notes were renewals and were not paid. The motion was overruled and exception noted.

Passing over the question whether the agency of the intestate for the parish in this respect could in law be shown by what he said and did at the time of, and in connection with, the negotiations with the plaintiff for the loan of the money, we will assume that in fact he borrowed the money for the parish and that the plaintiff then knew it. Yet the ruling was not erroneous. The undisputed evidence showed that the original note was signed by the intestate and by Bishop Michaud, each in his own name, and there was no evidence tending to show that the instrument contained anything upon its face showing that either was acting as

the agent of the parish. The same is true as to the evidence bearing upon the form and execution of the first renewal note; and as to the note in suit, it purports on its face to be a personal undertaking, signed by the intestate in his own name, and it contains nothing showing that in its execution he was acting in the capacity of agent. The question thus presented is, whether it is competent for the intestate's estate to discharge itself, on a plea of nonassumpsit, by proving the contract was really made by him as agent for the parish, and that the plaintiff knew it at the time when the note was made and signed. In *Arnold v. Sprague*, 34 Vt. 402, where the suit was on a bill of exchange, the draft was drawn on the defendant and accepted by him personally. There was nothing on the face of the draft showing that he was agent. The court said there could be no doubt that he was personally liable on the acceptance, though his agency was in fact known to the plaintiff. In *Bradley v. Blandin*, 89 Vt. 542, 95 Atl. 894, it was held that an agent may, if he will, bind himself in his individual capacity jointly and severally with his principal. In *Mayhew v. Prince*, 11 Mass. 54, the action was assumpsit upon several bills of exchange, drawn by the defendant, by putting his own name to them without any qualification. The defence set up was that the defendant was a mere agent of another person (naming him), for whose use and on whose account the bills were drawn. It was held that the agency under which the defendant acted was a matter between him and his employer; but that it could not protect him from the claim of the payees of the bills, who had a right to consider him as an independent drawer, notwithstanding they may have known that he was acting as the servant to one of the house on which the bills were drawn, the court saying it seems to be a general principle that the signer of any contract, if he intends to prevent a resort to himself personally, must express in the contract the quality in which he acts. In *Higgins v. Senior*, 8 M. & W. 834, Baron Parke said that in an action on an agreement in writing, purporting on its face to be made by the defendant, and subscribed by him, for the sale and delivery of goods, it is not competent for him, under the plea of nonassumpsit, to prove that the agreement was really made by him by the authority and as the agent of a third person, and that the plaintiff knew those facts; that to allow evidence to be given that the party who appears on the face of the instrument to be personally a contract-

ing party is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done. In *Jones v. Littledale*, 6 Ad. & Ell. 486, Lord Denman lays down the general proposition, "that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." To the same effect are the following cases: *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *Meyer v. Redmond*, 205 N. Y. 478, 98 N. E. 906, 41 L. R. A. (N. S.) 675; *Thomas Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 528, 100 N. E. 457, 461; *Sadler v. Young*, 78 N. J. L. 594, 75 Atl. 890; *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; *Cook v. Forker*, 193 Pa. 461, 44 Atl. 560, 74 Am. St. Rep. 699.

The foregoing holding on the question raised by the motion for a verdict shows that defendant's first and second requests to charge, were unsound in principle, and therefore properly refused; also, that the several exceptions to the charge as given, found under paragraph XI of the printed case, are without force.

Exception was taken to the failure of the court to charge that the presumption of innocence is not conclusive. But in effect the court did so charge. It told the jury that the plaintiff was presumed to be innocent of the crime of forgery, and that this presumption is a piece of evidence in her favor to be weighed in connection with the other evidence in determining whether the signature in question is the signature of A. J. Barron, and that this question is to be determined on the whole evidence. This was sufficient. It so excludes the idea of conclusiveness in the presumption as to leave nothing for argument.

The court charged that "It is immaterial when this note was signed, if it was signed by A. J. Barron, the defendant's intestate." The first clause of this quoted sentence is challenged. Bishop Michaud died on December 22, 1908, the funeral services were on December 29 at Burlington, and the funeral sermon was preached by Father Barron. During her examination by the defendant, the plaintiff testified that the latter came to her house in Richmond the week after Bishop Michaud was buried, she thinks on the 27th or 28th day of December; and in substance that he signed the note in suit on that occasion in the month of December. She further testified that she wrote the original note, ready for signing, and also each of the notes in renewal,

dating the latter the same in month and day as was the original, supposing that was the way to do. Defendant urges that in view of the claim that the note in suit is a forgery, and of the evidence tending so to show, the time *when* the note was signed was of importance, especially since defendant's evidence tended to show that Father Barron performed a marriage ceremony in Bennington on the day of the date of the note, January 2, 1909. There can be no doubt that the part of the charge of which complaint is here made was correct in law, and we think, taking the whole sentence together as it should be, it was in substance what the case called for in view of the claims of the parties and the conflicting evidence bearing on the genuineness of the signature affixed to the note.

In the course of the charge the court referred to the fact that the defendant had called the plaintiff as a witness, adding: "They were not bound by her testimony, but her testimony is to be weighed as that of all witnesses called in behalf of the defendant, giving it its due weight." To that part which stated that her testimony was to be weighed as that of all witnesses called by defendant, an exception was saved. It is argued that what the court there said cannot be understood otherwise than as directing the jury, in weighing the plaintiff's testimony, to disregard her bias and her interest in her own claim in controversy. But looking at the sentence as a whole, this is a strained construction. She was called by defendant (under the statute, P. S. 1596) "to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses," with the right to examine as in the cross-examination of witnesses. She was so examined, and her testimony was to be weighed like that of other witnesses called by defendant, (in the language of the charge,) "giving it its due weight." Evidently this quoted phrase was designed to mean, and does mean when properly understood, the same as though it read, "giving it such weight as under all the circumstances it is fairly entitled to receive." Thus understood, the charge was all that defendant could reasonably ask. *Dravo v. Fabel*, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. ed. 421. If the defendant thought that, because of the fact that the witness was the adverse party to the suit, the matter of her interest and bias in giving testimony should be brought more specifically to the attention of the jury, a suggestion to that effect should have been made to the court. In the absence of any such

suggestion, the general exception taken will not be considered as covering this specific claim now put forth. *Magoon v. Before*, 73 Vt. 231, 50 Atl. 1070.

Judgment affirmed. To be certified to probate court.

HASELTON, J., having been a witness in the case, did not sit.

FITZGERALD BROS. BREWING CO. v. JAMES A. KELLEY'S ESTATE.

Special Term at Rutland, November, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, J.J.

Opinion filed November 11, 1918.

*Motion for Directed Verdict—Intoxicating Liquors—Illegal Sale
—Original or Collateral Promise—Sale by Unlicensed Agent
—Validity—Action for Price—Question for Jury.*

The merits of a motion for a directed verdict depend upon the view of the evidence most favorable to the opposing party.

In a suit to recover from the estate of K. on an original promise by him in his life time to pay for certain intoxicating liquors sold and delivered to S., and defended on the ground that the liquors were sold to K. unlawfully, where the evidence was not so unequivocal as to afford the basis of but a single inference, the question whether the sales were to S. on K.'s credit, or to K. personally, was for the jury.

In such case, the question whether K.'s promise to pay for the liquors was original or collateral was for the jury.

Failure of a soliciting agent of a fourth-class licensee to comply with G. L. 6490, 6491, requiring certification, does not make sales of intoxicating liquor solicited by him illegal. The statute penalizes the solicitor, but not the sale.

Arrangement by plaintiff, fourth-class licensee, whereby only a part of the liquors billed to S., a seventh-class licensee, was to be sold and paid for under his license, and the remainder was to be kept in cold storage by him and delivered by him with a team provided

by plaintiff to other customers of the plaintiff on notice by it, and for which the plaintiff itself was to collect the pay and give S. credit for the same, was not illegal and in violation of G. L. 6490 if *bona fide* and not designed as a cover for illegal sales by S.

In such case, the true intent of the arrangement was a question for the jury.

APPEAL from the allowance by the commissioners on the estate of James A. Kelley of a claim presented by Fitzgerald Brothers Brewing Co. Declaration, contract on the common counts. Plea, the general issue. Trial by jury at the September Term, 1916, Rutland County, *Butler, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion states the case.

George W. Platt and Laurence, Laurence & Stafford for the defendant.

Marville C. Webber for the plaintiff.

TAYLOR, J. The plaintiff is a New York corporation engaged in manufacturing and bottling ales, porter, and lager beer at Troy, New York. During the years 1913, 1914, and 1915, it had a license to conduct a wholesale liquor business in this State. It claims to recover from the estate of James A. Kelley on an original promise by him in his lifetime to pay for certain intoxicating liquors sold and delivered to one Thomas Smith, who had a license of the seventh class to do business in the city of Rutland in 1914 and 1915. The claim specified is an unpaid balance due for liquors purchased by Smith between February 22 and May 1, 1915. There was trial by jury with verdict and judgment for the plaintiff. The only questions presented arise on exceptions to the overruling of defendant's motion for a directed verdict.

No claim is made that the goods sued for were not delivered, nor that the balance claimed has been paid. It is contended that the plaintiff cannot recover because the liquors were sold to Kelley, or to Kelley and one Rafferty, unlawfully. Plaintiff's license, which was of the fourth class, gave it the right to sell intoxicating liquors by wholesale to licensees only. Kelley held a second-class license under which he conducted business in the

Bardwell House block. The business carried on under the seventh-class license held by Smith was conducted at the "cold storage plant," as it was called at the trial. The defendant's claim was that this license, though issued to Smith, was in fact Kelley's, and that the business at the "cold storage" was owned by Kelley or by Kelley and Rafferty; that Smith was a mere servant and had no interest in the business; that, though the goods were shipped and charged to Smith, they were in fact sold to Kelley personally and not to Smith on Kelley's credit; and that the plaintiff knew these facts when it sold and shipped the liquors sued for.

It may be conceded that, if the plaintiff's dealings with the "cold storage" were with Kelley, or Kelley and Rafferty, personally knowing that Smith entered into the transaction only in name to give it color of legality, the form of the transaction would not save the plaintiff from the consequence of an unauthorized sale. See *Garrett-William Company v. Watkins*, 84 Vt. 299, 79 Atl. 387 Ann. Cas. 1913 A, 846. And it must be conceded that some of the evidence strongly tended to support the defendant's claim; but on a motion for a directed verdict the merits of the motion depend upon the view of the evidence most favorable to the opposing party—a fact too often ignored in presenting such motions for review.

The evidence in point was somewhat conflicting, and it cannot be said that it was so unequivocal as to afford the basis of but a single inference. Considered in the proper views, it fails to disclose any manifest illegality in the transaction involving the plaintiff; nor does it make the inference necessary that the plaintiff was party to an attempt to evade the law. Rafferty, called as a witness by the plaintiff, gave evidence partly in direct and partly in cross-examination tending to show that the "cold storage" business was really the business of himself and Kelley; that Smith worked for them on a salary and had nothing to do with the business except in name; that he heard Kelley telephone Thomas Fitzgerald, the plaintiff's vice-president and treasurer, respecting the "cold storage," and heard him say to Fitzgerald something to the effect that the "cold storage" license was his; that Smith meant Kelley; that he thought his name was mentioned; and that Kelley said the "cold storage" deal would be with Kelley and Rafferty. Fitzgerald, who it appeared represented the plaintiff in the negotiations with Kelley respecting the

business at the "cold storage," testified in direct examination in substance that his first talk with Kelley was by telephone, in which Kelley informed him that a seventh-class license had been granted to Thomas Smith to do business at the "cold storage" in Rutland and requested him to come to Rutland to make arrangements for supplying the "cold storage" with ale, lager, and bottled beer; that he asked who Smith was, and was told, "He is a friend of ours up here and is all right"; that Kelley said the transaction would involve considerable credit, as the goods were to be shipped in carload lots; that soon after witness came to Rutland, saw Kelley at his house, had a long talk with him about the manner of doing business at the "cold storage," including how the goods were to be shipped and how they were to be distributed to licensees; that Kelley gave orders for two carloads of beer to be shipped to Smith about April 30, 1914, and said that he (Kelley) would pay the bill; that the arrangements then made were to continue during the period of the license held by Smith, and Kelley said he would pay for goods sold to Smith during that time; that the goods then and subsequently ordered were shipped to Smith and charged to him on the books of the company; that it was arranged that witness should come to Rutland at regular intervals to settle the "cold storage" accounts with Kelley; that the account was settled in full up to February 20, 1915, Kelley making all the payments on Smith's account; and that he relied on Kelley to pay when he sold the goods.

In cross-examination Fitzgerald testified that he didn't regard Smith as principal in the business, understood from the start that Kelley was the principal, and afterwards thought he discovered that Rafferty had some interest; that he didn't remember of Kelley's telling him that Smith was going to have a license, but that it was really his and Rafferty's; said there may have been such a talk, but did not remember it; that he supposed he had a perfect right under his license to sell to either Kelley or Smith, as Kelley was himself a licensee; that he charged the goods to Smith at Kelley's request; that Kelley wanted the shipments to the "cold storage" to be in Smith's name as he had the license.

Later, he testified that all that Kelley said on the subject was that he wanted the goods charged to Smith; that Kelley told witness to ship the goods to Smith and he (Kelley) would pay for them.

The evidence made it a jury question whether the sales were to Smith on Kelley's credit, or to Kelley personally. If the sales were to Smith, it is not claimed that the transaction was unlawful, except in respect of certain matters to be considered later. It is also urged in support of the motion that, if Kelley was not the purchaser of the goods, his promise was collateral and unenforceable because not in writing. But the evidence was at least sufficient to make it a jury question whether Kelley's promise was original or collateral. Taking Fitzgerald's version of the oral agreement, it was clearly original, unless the import of the language used was affected by the attending circumstances. See *Pocket v. Almon*, 90 Vt. 10, 96 Atl. 421.

As a further ground of the motion, the defendant says the plaintiff cannot recover because Fitzgerald did not have an agent's certificate authorizing him to solicit business for the company in this State as required by what is now G. L. 6490, 6491. The point is inadequately briefed, but we infer that the claim is that the failure of such soliciting agents to comply with the statute requiring certification makes sales solicited by them illegal. But such is not the purpose and effect of that statute. It penalizes the solicitor, but not the sale. In thus disposing of the question, we do not intimate that the evidence disclosed a situation that required Fitzgerald to secure a certificate for his protection. Besides, in any event, the question was for the jury whether Fitzgerald took orders for the liquors involved in the suit in Rutland. There was evidence tending to show that the orders were received in Troy, either by letter or telephone.

Finally, the defendant says that the plaintiff cannot recover because, in connection with the goods for which recovery is sought, other goods were sold knowing that they were to be disposed of unlawfully. The claim is that the arrangement for such unlawful sales was a part of the contract whereby Kelley agreed to pay for the goods sued for; and that the goods intended for unlawful disposal were so mingled with those sold to Smith for lawful use, and the dealings between the parties so conducted, that the whole transaction was rendered illegal. The consideration of this ground of the motion makes it necessary to refer to an additional feature of the original arrangement. It appeared that the plaintiff had several customers in Rutland among the licensed liquor dealers; that one Kelliher was its duly certified soliciting agent in that vicinity, and that the preserva-

tion of its goods required that they be kept in a cool place. Certain of the evidence tended to show that to provide suitable storage and to facilitate deliveries to its customers, it was arranged that a stock of liquors should be kept on hand at the "cold storage." They were of the same kind as those required by Smith, were shipped in carload lots, and for convenience were charged to Smith's "cold storage" account. The plaintiff paid part of the rent of the storage plant and provided a team for making deliveries. Kelliher would take orders from plaintiff's customers and turn them over to Smith for delivery. Smith's account would be credited with the liquors thus delivered and fifty cents a barrel for delivery. The collections for all liquors thus disposed of were made by the plaintiff through its Troy office. The balance sued for was for liquors which Smith had disposed of lawfully to his customers. Briefly, the arrangement, according to the plaintiff's claim was this: Certain kinds of intoxicating liquors were to be shipped to the "cold storage" plant, part of which was for sale by Smith under his license and part for storage and delivery to the plaintiff's other customers. All of the goods were to be billed to Smith, but Kelley was to pay for only such as Smith sold under his license. Kelliher was to take orders from plaintiff's customers and notify Smith, who was to make the deliveries out of the goods in storage, receiving fifty cents a barrel therefor. The goods so delivered were to be credited to the "cold storage" account, and the plaintiff was to make the collections from its customers. This arrangement, if *bona fide* and not designed as a cover for illegal sales by Smith, would not give color to the defendant's claim. The true intent of the arrangement was for the jury. It is said that such an arrangement is expressly prohibited, and we are referred to No. 179, Acts of 1910, Sec. 3, which provides, among other things, that no person holding a license of any class shall be appointed an agent of a licensee of the fourth class. But this provision relates to the appointment of soliciting agents. Such service for a wholesale liquor dealer by a licensee, as the evidence tends to show was thus performed by Smith, is nowhere forbidden. We hold that the case was for the jury, and that the motion was properly overruled.

Judgment affirmed, to be certified to the probate court.

STATE v. ANNA FELCH.

February Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 19, 1918.

Criminal Law—Exceptions by State—Double Jeopardy—Federal Constitution—State Constitution—Due Process of Law—Privileges and Immunities of Citizens—G. L. 2598 Constitutional—Evidence—Cross-examination—Harmless Error—Opinion Evidence—Improper Conduct of Counsel—Offering Evidence Already Excluded—Improper Argument—Exceptions by State Before Final Judgment—Court's Discretion—Presumption Favoring Court Below.

In order to justify an exception by the State in a criminal case, it must be authorized by an express and valid statute.

G. L. 2598 gives a right of exception to the State in a criminal case equal in all respects to that possessed by the respondent.

The provisions of the Fifth Amendment of the Federal Constitution, wherein double jeopardy is prohibited, are not intended to limit the powers of the state governments in respect to their own people, but merely operate as restrictions upon Federal action.

The "due process of law" referred to in the Fourteenth Amendment of the Federal Constitution, wherein restriction is imposed upon state action, is due process according to the Constitution and laws of the particular state involved, provided the fundamental principles of our civil and political institutions are not violated.

G. L. 2598 does not abridge the privileges or immunities of United States citizenship in violation of the Fourteenth Amendment simply because it offends the double jeopardy provision of the Fifth Amendment.

Due process of law, which is the law of the land, is not immutable, but changes from time to time, and is a matter of legislation, provided that express constitutional provisions and the fundamental individual rights of life, liberty and property are not infringed or impaired.

G. L. 2598 is not in violation of our Bill of Rights, Art. 10, nor of the "due process" provision of the Fourteenth Amendment of the Federal Constitution.

Under the Constitution of Vermont, the first jeopardy of a respondent in a criminal case continues until a result free from error is attained.

Where no possible harm could have been done to the State by allowing an improper question to a witness on cross-examination, an exception thereto will not be sustained.

Where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, he is allowed, to a certain extent, to give his conclusion, judgment or opinion.

In the prosecution of a woman for the murder of her husband, acting in concert with her lover, it was error as to the State, though not necessarily reversible error, to exclude the testimony of a witness who saw the respondent, her husband and her lover at a social gathering, concerning the expression of her face and eyes when she looked at her lover.

Under the circumstances, it was reversible error for the respondent's counsel to deliberately persist in offering evidence as to a man whose hand had a little finger gone or useless, on the theory that there was testimony that the rifle used showed marks as if three fingers had grasped it, after the court had excluded similar evidence.

Where the respondent had given three statements which had been taken by a stenographer, two of them at statutory inquests, argument by her counsel that she had been "pounded and pommelled" by the State at the various inquests was not reversible error; counsel explaining, on objection, that he only used the words figuratively, and the offensive terms having been sufficiently withdrawn.

Under the circumstances, it was proper for the respondent's counsel to state in argument that she had testified knowing that she would be confronted by testimony taken stenographically elsewhere.

Where the State took exceptions, and there was a verdict of acquittal, the court properly refused to render judgment on the verdict, because G. L. 2598 expressly authorizes the court, in its discretion, to pass the case to the Supreme Court on the State's exceptions before final judgment; and, the record not showing that the court did not rule on this question as matter of discretion, it will be taken that it did.

INDICTMENT FOR MURDER. Plea, not guilty. Trial by jury at the June Term, 1917, Orange County, *Butler*, J., presiding. Verdict, not guilty. The State seasonably objected and excepted to certain rulings of the court in the admission of evidence, to certain rulings of the court in the exclusion of evidence, and to certain statements made by respondent's counsel in argument to the jury, which exceptions were allowed and the case passed to the Supreme Court before final judgment. The respondent seasonably objected and excepted to the allowance of any exceptions by the State to rulings of the court, on the ground that the law allowing exceptions in the trial of criminal causes by the State is unconstitutional and void. The respondent, after verdict, moved for judgment upon the verdict of not guilty, and excepted to the refusal of the court to render a judgment upon the verdict. The opinion states the other facts in the case.

Herbert G. Barber, Attorney General, and *John C. Sherburne*, State's Attorney, for the State.

Richard A. Hoar, *Ellen M. M. Hoar*, and *Alland G. Fay* for the respondent.

It is well settled that, by the common law, a person could not be twice put in jeopardy for the same offence. *Fix v. Ohio*, 5 How. 410; *Ex parte Bornee*, 58 L. R. A. (N. S.) 1093; *People v. Webb*, 38 Cal. 467; *United States v. Sanger*, 144 U. S. 310; *People ex rel. Hodson v. Miner* (Ill.) 19 L. R. A. 342; *Mitchell v. State*, 42 Ohio St. 383; *State v. Van Horton*, 26 Iowa 402; *Commonwealth v. Fitzpatrick*, 121 Pa. St. 109; *Whitten v. State*, 61 Miss. 717; *Whitmore v. State*, 43 Ark. 271; *State v. Anderson*, 3 Smedes & M. 751; *Robinson v. Commonwealth*, 88 Kentucky 386; *State v. Rook*, 61 Kan. 382; *Pizano v. State*, 20 Texas App. 139; *State v. Webb*, 48 Cal. 323; *State v. Benham*, 7 Conn. 414.

That the common law was in force and became a part of the Constitution of Vermont has been recognized by this Court. *State v. Hobbs & Strong*, 2 Tyler 380; *Spalding v. Preston*, 21 Vt. 9; *State v. Conlin*, 27 Vt. 318; *LeBarron v. LeBarron*, 35 Vt. 364; *State v. Peterson*, 41 Vt. 504; *State v. Phair*, 48 Vt. 366; *Quinn v. Halbert*, 52 Vt. 353; *In re Marron*, 60 Vt. 199; *State v. Burpee*, 65 Vt. 1, p. 11; *State v. Hodgson*, 66 Vt. 134; *State v. Dyer*, 67 Vt. 690; *State v. Brewster*, 70 Vt. 341; *State v. LaFor-*

rest, 71 Vt. 311; *State v. Slamon*, 73 Vt. 212; *State v. Stimpson*, 78 Vt. 124; *Clement v. Graham*, 78 Vt. 290; *In re Lydia Ann Allen*, 82 Vt. 365.

This Court has recognized that this principal of no second jeopardy was, at least, a part of the "law of the land," and has always enforced it whenever called upon to do so. If this Court has not said in so many words that this principle was embodied in our Constitution, it is because it has never been questioned before. Whenever the plea has been made, and the court has found, that a person had been either acquitted or convicted of the same offence, it has enforced the principle and discharged the respondent. *State v. Damon*, 2 Tyler 387; *State v. Smith*, 43 Vt. 324; *State v. Whipple*, 57 Vt. 637; *State v. Burpee*, 65 Vt. 1; *State v. Bradley*, 67 Vt. 465; *State v. Emery*, 68 Vt. 109; *State v. Bruce*, 68 Vt. 183.

Where the trial proceeds to a verdict, either of guilty or not guilty, then the respondent has been in jeopardy and the rule applies that he cannot be placed in jeopardy a second time, without his consent or some act on his part. *State v. Emery*, 59 Vt. 84; *State v. Champeau*, 52 Vt. 313; *State v. Whipple*, 57 Vt. 637; *State v. Bradley*, 67 Vt. 465; *State v. Damon*, 2 Tyler 387; *State v. Locklin*, 59 Vt. 654; *Commonwealth v. Murphy*, 174 Mass. 369; *Mitchell v. State*, 42 Ohio St. 383; *Commonwealth v. Fitzpatrick*, 121 Pa. St. 109; *Whitten v. State*, 61 Miss. 717; *Whitmore v. State*, 43 Ark. 271; *Robinson v. Commonwealth*, 88 Ky. 386; *Pizano v. State*, 20 Texas App. 139; *The People v. Webb*, 38 Cal. 467; *State v. Webb*, 48 Cal. 323.

POWERS, J. A jury acquitted this respondent of the charge of murder, and the State brings the case here for review on exceptions taken pursuant to G. L. 2598. The respondent also brings up an exception to the refusal of the trial court to render judgment on the verdict and order her discharge and she also files in this Court a motion to dismiss the exceptions of the State insisting, first, that by proper construction the statute referred to only gives the State the right to except to such preliminary rulings as may be made before the jury is sworn; and, second, that, if not so construed, the statute provides for putting a respondent in second jeopardy and is therefore unconstitutional and void.

We accept as unquestionably sound the claim of the respondent that in order to justify an exception by the State in a criminal case, it must be authorized by an express and valid statute. That the statute here in question undertakes to authorize such exceptions we have no doubt. It must be admitted that its language is not happily chosen, and that its true meaning is not at first reading entirely clear. But we cannot believe that it was the legislative purpose to provide for an exception to rulings upon demurrers and like questions alone. There is little reason or excuse for such a statute, and if that was all that was intended, it would have been an easy matter to have made it manifest. It is much more reasonable to suppose that the Legislature intended to provide a right of exception to the State equal in all respects to that possessed by the respondent. The language used indicates this. The second section provides that this Court shall hear the questions raised and render final judgment, or remand the case for "further trial," or other proceedings. The respondent insists that this expression sustains her interpretation of the statute. To this we cannot agree. If the Legislature had intended to limit the State to rulings preceding the empanelling and swearing of the jury, it naturally would have said "or remand the case for trial"; for, according to her interpretation, the actual trial had not begun when the exception was taken. Evidently the theory on which this statute is drawn is that the proceedings on remand would be a continuation of the trial already had, and not another new trial in any proper sense, though often spoken of in that way. We hold, then, that the terms of this statute rightly understood, authorize exceptions by the State, reserving just such questions as are here argued; and all others arising during the course of the trial.

On considering the constitutionality of the statute, we shall omit reference to statutes merely giving the prosecution the right of exception to such preliminary rulings as we have referred to, and shall pay no attention to statutes giving the prosecution the right of exception to other questions for the sole purpose of settling the law for future guidance, as decisions under them will afford us no assistance in the solution of the questions here presented. We shall assume, though it has been doubted (*State v. Lee*, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202; *United States v. Sanges*, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. ed. 445), that it was the well-recognized doctrine of

the ancient common law that no man could be twice put in jeopardy for the same offence. We are mindful of the fact that this rule was deemed of such importance that it was given a place in Magna Charta, and that it was regarded so vital to the maintenance of the Anglo-Saxon concept of individual liberty that it was made a part of the Constitution of the United States by the Fifth Amendment, and in one form or another has found expression in the Constitutions of a majority of the states of the Union. Under such constitutional provisions it has been consistently and uniformly held that any legislative attempt to confer upon the state the right of exception for the correction of trial errors was futile.

A statute of California attempted to give the state a right of appeal to the Supreme Court on all questions of law arising in prosecutions for felonies. In *People v. Webb*, 38 Cal. 467, it was held that the respondent's acquittal in the court below was final, and that he could not again be put in jeopardy. A statute of Illinois attempted to give the complainant a right of appeal in prosecutions for illegal fishing. In *People v. Miner*, 144 Ill. 308, 33 N. E. 40, 19 L. R. A. 342, it was held that the respondent's acquittal below was a complete protection from another trial and that the statute was unconstitutional. In West Virginia an act of the Legislature attempted to give the state a right of appeal in criminal cases, but it was held in *Ex parte Bornee*, 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915 F, 1093, that the act was unconstitutional.

By the provisions of a certain military order regularly promulgated for the government of the Philippine Islands, the right of the government to appeal from a judgment of acquittal in a court of first instance was recognized. But in *Kepner v. United States*, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. ed. 114, 1 Ann. Cas. 655, it was held that this was repugnant to a provision that "no person for the same offence shall be twice put in jeopardy of punishment," contained in an act of Congress subsequently passed for the administration of the affairs of the Islands, and was repealed by it. Though the question was not directly involved, it was said in *State v. Hart*, 90 N. J. Law 261, 101 Atl. 278, L. R. A. 1917 F, 985, that "it is clear that it is not within the constitutional power of legislative authority to confer by statute" upon the state the right of exception in criminal cases.

The foregoing views seem to be accepted as sound by one or two other cases not now at hand and are generally approved by text-writers and commentators. However, the theory that the jeopardy involved is single and continuous until a result is reached that is free from error is not without its defenders. See *State v. Lee*, *supra*, and dissenting opinion by Holmes, J., in *Kepner v. United States*, *supra*. Though not especially relied upon by the respondent, it is not improper in view of the importance of the case, to make brief reference to the Constitution of the United States. The provisions of the Fifth Amendment to that document, wherein double jeopardy is prohibited, are not intended to limit the powers of the state governments in respect to their own people, but merely operate as restraints upon Federal action. *Ex parte Spies*, 123 U. S. 131, 8 Sup. Ct. 31, 31 L. ed. 81; *Hunter v. Pittsburg*, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. ed. 151. And the due process of law referred to in the Fourteenth Amendment, wherein restraint is imposed upon state action, is due process according to the Constitution and laws of the particular state involved, provided the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" are not violated. *Ex parte Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. ed. 519. It cannot be said that the act in question abridges the privileges or immunities of United States citizenship in violation of the terms of the Fourteenth Amendment simply because it offends one of the specific provisions of the Fifth Amendment. Although it has been vigorously asserted that the rights specified in the first eight amendments are among the privileges and immunities protected by the Fourteenth Amendment, and although this view has been defended by many distinguished jurists, including several Justices of the Federal Supreme Court, that Court holds otherwise and asserts that it is the character of the right claimed, whether specified as above or not, that is controlling. *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. ed. 597.

It is interesting to note in this connection that the question whether double jeopardy amounts to want of due process under the Federal Constitution was suggested and its importance recognized by Mr. Justice Harlan in *Dreyer v. Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. ed. 79, but was left undecided. It is also of interest to note that in *Ex parte Ulrich*, (D. C.) 42 Fed. 587, it was held by Judge Philips that, inasmuch as it is a principle

of the common law that no one shall be twice placed in jeopardy for the same offence, the trial and commitment of one who has already been partly tried and in legal effect acquitted of the same offence is depriving him of his liberty without due process of law, within the meaning of the Fourteenth Amendment. Of that decision, whatever else might be said, it is enough now to say that it was put wholly on common-law grounds, no statutory provision being involved; it arose in a state whose Constitution contains a provision against double jeopardy, and it is predicated upon a view of legal jeopardy wholly at variance with that of this Court as expressed in *State v. Champeau*, 52 Vt. 313, 36 Am. Rep. 754.

The case in hand does not require a discussion of the true meaning of the term "jeopardy," as used in the cases hereinbefore referred to. They were decided under provisions, either constitutional or statutory, expressly prohibiting a second jeopardy for the same offence. Our own Constitution contains no such provision. If the statute in question conflicts with any of its provisions, it is with the one contained in this clause of the 10th Article of the Bill of Rights: "Nor can any person be justly deprived of his liberty, except by the laws of the land." So it remains to consider whether the statute violates this provision or the due process provision of the Fourteenth Amendment to the Federal Constitution.

We have not far to look for a satisfactory and authoritative interpretation of our constitutional provision, for it received the painstaking attention of Judge Rowell in *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153, 6 Ann. Cas. 639. It was claimed in that case that this provision required prosecutions for common-law felonies to be by indictment, since, as the phrase in question was used in Magna Charta, it so required by the settled judicial construction in England prior to the adoption of our Constitution; and that, when we took the phrase, we took the construction with it. It was held otherwise, however, and the true meaning of the expression "the law of the land," and its legal equivalent "due process of law," was fully considered and discussed, and the conclusion was reached that the law of the land was not beyond the reach of the Legislature, that it varies from time to time according to legislative fiat, and that any statute otherwise valid that leaves unimpaired the fundamentals of individual rights of life, liberty, and property is not inconsistent therewith. And this is in entire accord with the

holdings of the Federal Supreme Court already referred to. The question before us, then, comes to this: Does this statute affect the respondent's fundamental rights? That it violates the rules of the ancient common law, that it infringes rights specified in Magna Charta, that it revises the policy of the State in criminal matters, and imparts something of a shock to a mind trained in the common law—these considerations are not controlling.

Due process of law—the law of the land—is not immutable. It changes from time to time. What due process requires in New Hampshire may not be necessary in Vermont. It is a matter of legislation, provided, always, that express constitutional provisions and the fundamental rights referred to are not infringed or impaired. *Brown v. New Jersey*, 175 U. S. 175, 20 Sup. Ct. 77, 44 L. ed. 119.

To determine just what those fundamental rights are—to enumerate or define them—would be a matter of some difficulty. It has never been attempted, and will not be now. *State v. Stimpson*, *supra*, shows that a presentment by indictment is not one; and *Brown v. New Jersey*, *supra*, shows that trial by jury even is not one. Of course we are now speaking of what due process requires, and leave out of consideration express constitutional requirements.

We now hold that relief from the vexation of a second trial is not one, and that the constitutional provisions under discussion are not infringed by the statute in question. This view is indirectly approved in *Ex parte Bornee*, *supra*, wherein attention is called to the fact that the Constitution of Virginia (which in this respect is like our own) does not prevent the passage of an act granting the state the right of appeal in criminal cases.

In *State v. Lee*, *supra*, a statutory right of appeal by the State in a criminal case was sustained, and though the Constitution of Connecticut does not in terms prohibit a second jeopardy, the case is treated as one involving this question, and is put upon the ground that the first jeopardy continues until a result free from error is attained.

The first exception briefed by the State was taken during the cross-examination of Mrs. McCormack, a witness for the State. The only ground on which the State then based its objection was that the question asked was not proper cross-examination. However this may have been, no possible harm could have been done by allowing the question, and this exception is not sustained.

It was the theory of the State that the respondent shot her husband acting in concert with Otis Williams, whose mistress she was, and that the killing was done to remove an obstacle to the enjoyment of their illicit relations. To show these relations, the State used various witnesses. Among these was L. T. Welch, a deputy sheriff. He testified that he saw the respondent, her husband, and Otis Williams together at a social at Waits River, that Mr. Felch was sitting between the respondent and Williams, that he saw the latter look at each other and smile, and that he saw them do this but once. He was then asked if he noticed the expression of the respondent's face and eyes, and this being excluded on objection, the State excepted. Standing alone, the importance of the rejected evidence does not seem very great; but that it was admissible under well recognized rules of evidence, seems clear. It is true that, as a general rule, witnesses are to state facts and not give their inferences or opinions; but this rule is subject to the exception that "where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who had the benefit of personal observation, he is allowed, to a certain extent, to add his conclusion, judgment or opinion." *Bates v. Sharon*, 45 Vt. 474.

Under this exception to the rule, it is permissible for a witness to testify that one's actions were strange and unnatural. *Fairchild v. Bascomb*, 35 Vt. 398; that a man appeared worried, *State v. Bradley*, 64 Vt. 466, 24 Atl. 1053; that a horse seemed tired, *State v. Ward*, 61 Vt. 153, 17 Atl. 483; that two persons were very intimate, *State v. Marsh*, 70 Vt. 288, 40 Atl. 836; that a person was domineering, *Mathewson v. Mathewson*, 81 Vt. 173, 69 Atl. 646, 18 L. R. A. (N. S.) 300; that there was nothing peculiar in one's talk or action, *In re Esterbrook's Will*, 83 Vt. 229, 75 Atl. 1; that certain questions were sensible, *In re Smith's Will*, 88 Vt. 259, 92 Atl. 223. So, too, it is held that a witness may testify that one spoke affectionately of another, *Appeal of Spencer*, 77 Conn. 638, 60 Atl. 289; that a respondent acted "sneaky," *Com. v. Borskey*, 214 Mass. 313, 101 N. E. 377; and that one was affectionate toward another, *McKee v. Nelson*, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384. And speaking generally, an ordinary observer may be allowed to state that one appeared

pleased, angry, excited, friendly, insulting, affectionate, or the like. Elliott Ev. § 678. That the jury might have had the benefit of all there was to the incident, the excluded evidence should have been admitted. The raising of an eyebrow, the wave of a handkerchief, or the flash of an eye may give character to an act otherwise too trivial for notice. Without saying that it was of sufficient importance to require a reversal, we hold that it was error to exclude the offered evidence.

The respondent was a witness in her own behalf. In re-direct examination she was asked if she knew anyone in the vicinity of her home on whose left hand the little finger was either stiff or missing. This question was based upon the theory that there was testimony in the case indicating that the rifle used by the murderer showed marks as if three fingers had grasped it. The State objected to the question asked the respondent, and after full discussion and deliberation it was excluded. Later on, when Otis Williams was under cross-examination, respondent's counsel asked him if his father, Asa Williams, was the man whose right hand or whose left hand had a little finger gone or useless. This was excluded and the State was allowed an exception to the asking of the question. That it is, in some circumstances, reversible error to persist in offering evidence that has been ruled out is shown by *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438. The reason is obvious. Right or wrong, the ruling of the court is the law of the trial, and it is the duty of parties and counsel to accept it as such. This is recognized as the law everywhere. An offence of this kind, however, does not always require a reversal. Much depends upon the character and importance of the offered evidence and the good or bad faith of counsel, and each case must be judged on its own circumstances. That the action of counsel in the case before us was deliberate can hardly be doubted. When the matter was called to the attention of the respondent as above stated, the doubt of her counsel as to its admissibility is plainly evidenced by the fact that he cautioned her not to answer his question until the State had an opportunity to object. At the time this question was put to Otis Williams, he was first asked if there was any trouble with his father's hand. This was objected to. Then, without waiting for a ruling, the counsel asked the question in regard to Asa Williams above specified, which was more damaging to the State's case than the one first asked. Though the court

ruled that there was no evidence tending to connect a three-fingered man with the crime, there was enough in the cross-examination of State's Attorney Williams when he was on the stand, to lead the jury into a misconception of the importance of the fact embodied in the question. For, when asked if he noticed anything on the wooden part of the rifle that indicated that three fingers had grasped it, he replied that it "looked like finger marks"; but he turned the gun over to an expert. It would be quite natural for a jury to accept this as an admission that the marks were three in number, and thus the importance of identifying a three-fingered man suggested. In the circumstances, the conduct complained of was unwarrantable and prejudicial, and the exception is sustained.

It appears that on the Sunday following the homicide, the State's attorney had an interview with the respondent and that the conversation was then taken in shorthand. A transcript of this conversation was an exhibit in the case. On two other occasions she had given her statement at inquests held under the statute, and it had been recorded by a stenographer. In referring to these statements, counsel for the respondent said in argument that she had been "pounded and pommeled," by the State at the various inquests. Objection being made, counsel explained that he only used the words figuratively, and, if any question was made about it, would withdraw the statement; that he only meant that she had been subjected to the ordeal of three or four examinations taken down by a stenographer, before she testified in court, and that she knew, if she changed her story, her former statement would confront her. It being called to the attention of counsel that only one of her sworn statements had been introduced in evidence, he said he would limit his comments to that statement; but, when he again addressed the jury, he did not do so in express terms. Just what he said was that the respondent had testified, knowing that she would be confronted by testimony taken stenographically somewhere else. Assuming that this left that matter in such shape that the jury was warranted in keeping in mind that there were three outstanding sworn statements that could be used against her if she changed her story, we think the argument was, in the circumstances, free from reversible error. The offensive and unwarrantable terms used at the outset to characterize the vigilance of the State's attorney were sufficiently withdrawn. The fact that the re-

spondent had given three sworn statements, though two of them were at secret inquests, was a proper matter of comment, at least to the extent here indulged. To be sure, the statute penalizes the unlawful disclosure of the evidence so taken, but expressly provides that the stenographer may disclose it under order of the county court. Without doubt, if the interests of the State required, such order would be made; otherwise one of the principal benefits of the statute would be lost.

The respondent's exception to the refusal of the court to render judgment on the verdict cannot be sustained. The statute (G. L. 2598) expressly authorizes the court, in its discretion, to pass the case to this Court on the State's exceptions before final judgment. The record does not show that the court below did not rule on this point, as matter of discretion, so it will be taken that it did. *Slack v. Bragg*, 83 Vt. 404, 76 Atl. 148.

Her motion to dismiss is overruled, for reasons already sufficiently set forth.

The exceptions of the State are sustained, and the case is remanded for retrial.

ROSA B. STOCKWELL v. THOMAS E. STOCKWELL'S ESTATE.

Special Term at Brattleboro, February, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 19, 1918.

Husband and Wife—Wife's Separate Property—Presumption—Gift from Husband—Burden of Proof—Antenuptial Agreement—Husband as Trustee—Trusts—Accounting After Death of Trustee—Duty of Trustee—Records—Burden of Proof on Trustee—Cestui—Evidence—Book Accounts—Memoranda—Nature of Books and Entries—Diary—Documentary Evidence—Statute of Limitations as to Wife's Claim Against Husband.

It will be presumed that a married woman holds personal property as her separate estate; and it is for him who asserts that such

property was acquired by her by gift from her husband to prove it.

An antenuptial arrangement whereby a husband took title to a timber lot to himself, and held it for his wife and agreed to lumber it for her benefit, created a trust relation between them.

In such case, where the trust was fully performed and ended in the husband's lifetime, except as to the matter of accounting, an action at law could be maintained by the *cestui* against his estate.

In such case, an agreement by the parties that the husband could use the money received from the sale of the lumber cut on the lot, for a short time, was not a waiver of an accounting, but merely a postponement thereof.

A trustee must keep proper books and records, and, upon being called to account, has the burden of making a proper accounting and proving the credits claimed; upon his failure to do so, all intendments are against him.

It is unnecessary for a *cestui* in his action for an accounting to show that there is anything his due.

Entries in books of any kind which are charges in book account are admissible in evidence as such, while entries which are memoranda, merely, are inadmissible. The manner and purpose of keeping the account, rather than the form of the books themselves, determine to which class the entries belong.

An entry, "Nov. 23 Loaned T. E. Stockwell without security \$125.00," on a page headed "Memoranda" in the back part of a diary, suitable, if not intended, for debit and credit items, and where other loans were so charged in the same book, was a charge in book account, and admissible in evidence.

Entries appearing in a diary as a part of the day there recorded, with nothing to indicate that they were intended for anything more, are not book charges, but memoranda, and are inadmissible.

A wife's claim for money loaned to her husband, either before or after the marriage, does not outlaw as long as the marriage relation continues.

APPEAL from the decision of commissioners disallowing the the claim of Rosa A. Stockwell presented against the estate of Thomas E. Stockwell. Declaration, general assumpsit. Pleas, the general issue, payment, and the statute of limitations. Trial by court at the September Term, 1916, Windham County, *Slack*, J., presiding. Judgment for the plaintiff for a part of her claim. The plaintiff excepted. The opinion states the case.

Harvey & Whitney and Hale K. Darling for the plaintiff.

So far as the indebtedness from the decedent to the plaintiff before marriage is concerned, the marriage of the parties did not extinguish it, and she retained all her rights in respect of it, except the right to sue on it in her own name. G. L. 3521, 3524; *Spencer v. Stockwell*, 76 Vt. 176; *Wright v. Burroughs*, 61 Vt. 390.

As to the indebtedness which accrued after the marriage of the parties, it cannot be doubted that during the lifetime of Thomas E. Stockwell it constituted a valid claim in favor of the plaintiff, though perhaps enforceable only in equity. *Bullard v. Goodno*, 73 Vt. 88; *Hacket v. Mozley*, 65 Vt. 71; *Barron v. Barron*, 24 Vt. 375.

The commissioners on Mr. Stockwell's estate had jurisdiction to receive and adjudicate all claims which during his lifetime, because of the marriage relation, could not have been enforced directly by an action against him, brought by his wife. *Metcalf v. Metcalf's Est.*, 89 Vt. 63; *Downs' Admr. v. Downs' Exr.*, 75 Vt. 383; *Atkins' Est. v. Atkins' Est.*, 69 Vt. 270; *Spaulding v. Warner's Est.*, 52 Vt. 29; *Holdridge v. Holdridge's Est.*, 53 Vt. 546.

W. R. Daley and W. D. Smith for the defendant.

The court has not found that the deceased received any of the plaintiff's sole and separate estate, and the defendant contends that where the origin of the claimant's title is purely equitable, the probate court is without jurisdiction, and hence the county court on appeal is without jurisdiction. *Leonard v. Leonard*, 67 Vt. 318; *Re Parson's Est.*, 64 Vt. 193; *Hodges, Admr. v. Hodges' Est.*, 90 Vt. 214.

In the absence of any statute expressly providing otherwise, it is usually held that the payment or loan of money is not properly the subject of a book charge; that the person paying or loaning money has it in his power to perpetuate evidence of that fact by taking a receipt or note, and that hence there can be no necessity of his resorting to his books to prove the fact in question. *Reeve v. Whitmore*, 2 Drew and S. 446; *Parris v. Bel-lows*, 52 Vt. 351; *Müller v. French*, 1 Aik. 99; *Maine v. Harper*, 4 Allen (Mass.) 115.

A pass book upon which a party entered at the time memoranda of certain payments made by him upon a note which he owed is not admissible as independent evidence by itself to prove such payment. But it may be referred to by such party, when a witness, for the purpose of refreshing his recollection of the fact. *Lapham v. Kelly*, 35 Vt. 195; *Barber v. Bennett*, 62 Vt. 50; *Bates v. Sabin*, 64 Vt. 511; *Hunter v. Kittredge's Est.*, 41 Vt. 359; *Pingree v. Johnson*, 69 Vt. 225; *Parris v. Bellows' Est.*, 52 Vt. 351; *Briggs v. Georgia*, 15 Vt. 61; *Burnham v. Adams*, 5 Vt. 313; *Jaquith Co. v. Shumway's Est.*, 80 Vt. 557.

POWERS, J. The plaintiff appealed from the disallowance of her claim against the estate of her late husband, Thomas E. Stockwell. The trial below was by the court, and resulted in a judgment disallowing all the items in the plaintiff's specifications, except the item of thirty-five dollars for a cow sold Stockwell. The plaintiff excepted. The specifications included twenty-eight items, of which only those hereinafter referred to are discussed in the plaintiff's brief. All these items pertain to property held by Mrs. Stockwell as her separate estate. As we shall see, a part of these are for money loaned, and it must be taken, the contrary not appearing, that this money was so held by her; for though G. L. 3524 (the statute defining the status of a married woman's personal property) expressly excepts personal property and rights of action acquired by her by gift from her husband, it is for him who asserts that the property in question comes within the exception to prove it. The other items are for lumber and ties cut from the Barrows lot, so-called, under an antenuptial arrangement whereby Stockwell took the title to himself and held it for the claimant and agreed to lumber it for her benefit. This arrangement created a trust relation between the parties; but, as will be seen, the trust was fully performed and ended in Stockwell's lifetime, except as to the matter of accounting. In such circumstances, an action at law can be maintained by the *cestui*. *Parker v. Parker*, 69 Vt. 352, 37 Atl. 1112. In these circumstances shown by the record, the commissioners had full jurisdiction over all the items of the claim. *Metcalf v. Metcalf*, 89 Vt. 63, 94 Atl. 1.

Items 4, 5, 6, 12, 13 and 21. These are all for cash loaned by the claimant to her husband, and depend for their proof upon

the admissibility of certain entries in the plaintiff's diaries. Of these entries it is found that they are in the handwriting of the plaintiff, that they were made at or about the time indicated therein, that they were made according to her usual manner of recording such transactions, and that they were her only books of account kept at that time. No other evidence to support these items was received.

The diary of 1899 was a small book in which one page was assigned to each day in the year. In the back of the book were several pages headed "Cash Account," which were ruled as such accounts usually are with columns headed "Received" and "Paid." Various appropriate entries appeared on these pages. Following these pages were a few pages headed "Memoranda," ruled into three columns, one on the left of the page for the date, and two at the right headed, respectively, "Dolls." and "Cts." On one of these pages were two entries of money lent to other persons, and in another was an entry as follows: "Nov. 23, Loaned T. E. Stockwell without security \$125.00." This was item 4 on the specification. Item 21 was shown only by an entry in the diary of 1901. This, also, was a small book with one page assigned to each day, and with similar "Cash Account" and "Memoranda" sections in the back part. In the diary part of this book on the page assigned to April 3, 1901, appeared this entry: "Loaned Stockwell five dollars to pay Woods." All the other items of this group were shown only by entries found in the diary of 1900. This was a larger book with a page for each day, and at the back there was, in addition to a "Cash Account" and "Memoranda" section, a few ruled pages for "Bills Payable" and "Receivable." On the page of the diary part assigned to March 7, this entry appeared: "I made walnut cake Ligh (Stockwell) and I went to the Eastern Star meeting in Brattleboro afternoon and evening. I was sick in evening and had to leave the hall. I got a cashier's check cashed for \$50 and lent the money to Stockwell. Saw Mary Shepardson in Drug Store." This entry may be taken as fairly showing the character of the entries regarding the remaining items of the group.

The law does not require any particular form of bookkeeping, or the use of any particular kind of a book. It is established by the former decisions of this Court that if these entries are memoranda, merely, they are inadmissible, for a man is not al-

lowed to provide evidence for himself by making an entry of that character. *Parris v. Bellows' Est.*, 52 Vt. 351; *Post v. Kenerson*, 72 Vt. 341, 47 Atl. 1072, 52 L. R. A. 552, 82 Am. St. Rep. 948. And it makes no difference that such entries are found in a day-book, journal, or ledger. *Gleason v. Kinney's Admr.*, 65 Vt. 560, 27 Atl. 208. On the other hand, if these entries are charges in book account, they are admissible (*Lapham v. Kelley*, 35 Vt. 195), and it is of no consequence that they are found in a diary (*Gleason v. Kinney's Admr.*, *supra*), or even on a slip of paper. *Bell v. McLeran*, 3 Vt. 185. In determining to which of these classes the entries belong, the nature of the transaction and entry is to control. It is the manner and purpose of keeping the account, rather than the form of the books themselves, that is the important consideration. *Post v. Kenerson*, *supra*.

Item 4 should be considered by itself. Here we have an entry, not in the diary part of the book, but in a part suitable, if not intended, for debt and credit items. The fact that the page is headed "Memoranda" is not controlling. The fact that this entry was made there instead of in the body of the diary, indicates that it was intended for something more than a note to help the memory (*Barber v. Bennett*, 58 Vt. 476, 4 Atl. 321, 56 Am. Rep. 565)—even a charge against the decedent. The loan was a proper matter of book charge (*Warden v. Johnson*, 11 Vt. 455; *Keeler v. Mathews*, 17 Vt. 125; *Plimpton v. Gleason*, 57 Vt. 604), and while the entry lacks the usual formalities of a book charge too much nicety should not be required in this respect. It was the plaintiff's way of keeping an account of the loan,—her way of charging it. This is shown by the other loans so charged on the same book. The honesty of the transaction is not questioned and the preliminary facts are found. This charge was admissible. The other entries regarding items of this group were not admissible. They are mere memoranda and not in any respect book charges. They appear in the diary itself as a part of the events of the day there recorded. There is nothing to indicate that they were intended for anything more, and they come within the general rule excluding diary entries. *Costello v. Crowell*, 139 Mass. 588, 2 N. E. 698; *Hutchins v. Berry*, 75 N. H. 416, 75 Atl. 650.

While the entry regarding item 21 was not mingled with other recited facts, it was nothing more than a memorandum and was equally inadmissible.

Items 25, 26, 27 and 28. These are the items for the lumber and ties from the Barrows lot. By the written agreement above referred to, it appears that the money used to buy this lot was the money of the plaintiff and that, as between her and Stockwell, the lot belonged to her. It was therein provided that Stockwell should lumber the lot and account to her for the proceeds. He cut the lumber and ties under this agreement and received therefor \$1,013.02. At the time he received this money, he talked the matter over with the plaintiff, and it was agreed upon between them that he should use it and pay it to her later. No accounting appears to have been had at this time, and so far as shown he never informed the plaintiff of the net amount so received. It is found that the sum above named was the gross amount received by Stockwell, and that, in an accounting with the plaintiff, it ought to be reduced by the expense of the cutting and hauling; but it is further reported by the court that the evidence on this subject was so meagre and unsatisfactory that it was unable to find what the cutting and hauling amounted to. The items were disallowed.

As we have seen, the antenuptial arrangement created a trust. This relation of the parties was not affected by the agreement that Stockwell should use the money for a short time. The accounting between them was merely postponed; it was not waived. If, as the defendant here claims, this agreement did result in changing their relation into that of debtor and creditor, simply, the result would not be to exclude the jurisdiction of the commissioners, but might affect the question on which the rights of the parties depend, so far as these items are concerned. That question is: Where is the burden of proof? It is a rule very generally, if not universally adopted by the courts that, when a trustee is called to account, the burden is on him to make a proper accounting, and, on failure so to do, all intendments are against him. He must keep proper books and records. The law assumes that he knows all about the transactions involved and must reveal the true facts. 39 Cyc. 476; 2 Perry, Trusts, § 821; 3 Pom. Eq. 1063. If he claims credits, he must prove them. *Choctaw, etc., R. R. Co. v. Sittel*, 21 Okla. 695, 97 Pac. 363. It is not necessary for the *cestui* to show that there is anything his due. *Frethey v. Durant*, 24 App. Div. 58, 48 N. Y. Supp. 839.

This rule accords with our own in kindred matters. See *Farwell v. Steen*, 46 Vt. 678; *Spaulding v. Wakefield's Est.*, 53 Vt. 660, 38 Am. Rep. 709; *McCloskey v. Gleason*, 56 Vt. 765; and *Rich, Admr. v. Austin*, 40 Vt. 416, 433. The failure in the proof, then, was that of the estate, and the items should have been allowed.

The statute of limitations was pleaded and is relied upon, but it will not defeat the plaintiff's claim. While there is some disagreement in the books, the rule of the best reasoned cases is that money lent by a woman to her husband does not outlaw as long as the marital relation continues. This results from the unity of husband and wife, and notwithstanding the modern statutes regarding married women's property rights, she cannot sue her husband, and the rule remains the same. Public policy still forbids that the parties shall be vexed by pressing claims against each other, and these are not in danger of outlawing during coverture. *Angell*, Lim. § 60; *Metlas v. Williams*, 86 N. J. Eq. 330, 97 Atl. 961; *Morrison v. Brown*, 84 Me. 82, 24 Atl. 672; *Barnett v. Harsbarger*, 105 Ind. 410, 5 N. E. 718; *Dice v. Irwin*, 110 Ind. 561, 11 N. E. 488; *Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; *Kennedy v. Knight*, 174 Pa. 408, 34 Atl. 585; *Gillan v. West*, 232 Pa. 74, 81 Atl. 128. And it makes no difference if the transaction took place before the marriage. *Fourthman v. Fourthman*, 15 Ind. App. 199, 43 N. E. 965; *Second Nat. Bank v. Merrill*, 81 Wis. 142, 50 N. W. 503, 29 Am. St. Rep. 877.

Judgment reversed and cause remanded.

STATE v. FRANK C. KAATZ.

May Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 19, 1918.

Criminal Law—Information—Demurrer—Advertising as Physician—Exceptions not Briefed Waived—Final Trial—Discretion of Court—Demurrer not Waived by Going to Trial.

It is unnecessary to allege in an information for advertising and holding one's self out to the public as a physician and surgeon, that the respondent practiced medicine without a license.

Exceptions not briefed are waived; and the Court will not, to reverse a case, search the record for defects or errors not called to their attention by the respondent.

When the trial court overrules a respondent's demurrer to a complaint, it is within its discretion to send, or to refuse to send, the case to the Supreme Court before final trial; and, when it does not appear that that discretion has been abused, its refusal to send the case to Supreme Court is not reviewable.

A respondent's demurrer to a complaint which has been overruled is not waived by going to trial on the merits, and he can be heard on the same in Supreme Court as well after as before trial in the court below.

INFORMATION in three counts charging the respondent of unlawfully advertising and holding himself out to the public as a physician and surgeon under P. S. 5370, 5371, and amendments thereof. At the September Term, 1917, Chittenden County, Fish, J., presiding, the respondent demurred to the information. To the overruling of the demurrer, and the court's refusal to pass the case to the Supreme Court before trial on the merits, the respondent excepted. The respondent then entered a plea of not guilty, and there was a trial by jury. Verdict, guilty; and judgment thereon. The respondent excepted.

The substantial allegations in the three counts of the information are similar. The first count, after alleging that the respondent was not licensed to practice osteopathy, medicine, or

surgery in Vermont, and was not a person excepted from the provisions of the statute, alleges that the respondent, at Burlington in the county of Chittenden, on January 29, 1917, did then and there advertise himself and hold himself out to the public as a physician and surgeon and therein circulated among the people and inhabitants and made public in said Burlington and in divers and many other towns, places and localities in said county of Chittenden, an advertisement or advertisements reading and appearing in manner and form as follows:

“CHIROPRACTIC

(Ki-ro-prak-tik)

Spinal Analysis Chart

You need not be Sick

Chiropractic Adjusts

The Cause of Disease.”

and also an advertisement and advertisements reading and appearing in manner and form as follows:

“What is Chiropractic?

(Ki-ro-prak-tik)

It is not Medicine; Not Surgery;

Not Osteopathy

It Deals directly with the Cause of Ill Health

“It is a scientific method of adjusting the cause of ‘disease’ without drugs or instruments, based on correct knowledge of anatomy, especially the nervous system. The Chiropractic idea is that the cause of so-called ‘disease’ is in the person afflicted, and the adjustment in overcoming that cause. The function of every organ in the body is controlled by mental impulses from the brain, which it transmits over the nerves. Any impingement of these nerves interfering with the transmission of mental impulses results in an abnormal function commonly called ‘disease.’ This interference is produced by subluxated vertebrae pressing upon the nerves as they pass out from the spinal cord. The trained adjuster locates the obstruction or interference, and by means of adjusting the subluxated vertebrae overcomes the cause, and normal condition or health is the result.

“Investigation costs nothing, and means health and happiness.

Frank C. Kaatz

Chiropractor

Hours: 3 to 5 p. m. Evenings.

Monday, Wednesday and Friday, 7 to 8

Suite 7, Y. M. C. A. Building.

Phone 824-R.

Burlington, Vt."

and also did then and there in said Burlington and in divers and many other towns, places and localities in said county of Chittenden, circulate among the people and inhabitants thereof and make public other pamphlets, papers, reading matter and literature advertising himself to the public as such physician and surgeon and also did cause a sign to be displayed, exposed and maintained on the outside of the building in which his office was then and there located in said Burlington, reading and appearing in manner and form as follows:

"Office of F. C. Kaatz, D. C.

Chiropractor

Hours 3-5."

and also caused a sign to be displayed, exposed and maintained on the outside of the door of his office then and there in said Burlington, reading and appearing in manner and form as follows:

"Office of F. C. Kaatz, D. C.

Chiropractor

Hours 3-5."

thereby intending to imply and designate himself to the public as being a person to locate the cause of disease, to cure disease and the cause of disease by the "laying on of hands" in the use of, by and through the means of the system or method called "Chiropractic," contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the state.

M. G. Leary, M. H. Alexander, and Morris & Hartwell of La Crosse, Wis., for the respondent.

Allen Martin, State's Attorney, and *Rufus E. Brown* for the State.

MILES, J. This is a prosecution against the respondent for advertising and holding himself out to the public as a physician and surgeon without being licensed as required by law, and was by information in three counts, to which the respondent de-

murred. The demurrer was overruled, and to this the respondent excepted. Upon the overruling of the demurrer, the respondent moved to have the case sent to this Court before final trial. This motion was overruled, to which action of the court the respondent excepted. The case was then tried by jury, and a verdict of guilty was found, and the case comes here on the exceptions to the overruling of the respondent's demurrer and motion.

The only ground of demurrer stated in the respondent's brief is that the information does not specifically charge the respondent with having practiced medicine without a license. No such ground is stated in the exceptions nor in the demurrer, and the prosecution is not for practicing medicine contrary to law. The respondent commences his exceptions by saying: "This is a prosecution against the respondent for advertising and holding himself out to the public as a physician and surgeon." It was, therefore, unnecessary to allege that the respondent practiced medicine without a license, and the information was not subject to demurrer for failure to so allege. The point argued is not raised by the exceptions and no other ground of demurrer being stated and relied upon in the respondent's brief, we do not, to reverse a case, search the record for defects or errors not called to our attention by the respondent. Exceptions not briefed are waived: *Rogers v. Bigelow*, 90 Vt. 41, 96 Atl. 417; *Parry & Jones v. Empire Granite Co.*, 90 Vt. 231, 97 Atl. 985; *Bagley v. Cooper*, 90 Vt. 576, 99 Atl. 230.

The other exception relied upon by the respondent is to the trial court's refusal to pass the case to this Court before final trial. No authorities are cited in the respondent's brief supporting this exception and none, we think, can be found. It was a matter wholly within the discretion of the trial court (G. L. 2262), and being within the discretion of the trial court, and it not appearing that that discretion has been abused, it is not reviewable by this Court (*Lincoln v. C. V. Ry. Co.*, 82 Vt. 187, 72 Atl. 821, 137 Am. St. Rep. 998; *Manley Bros. v. B. & M. R. R. et al.*, 90 Vt. 218, 97 Atl. 674); besides the respondent has not been harmed by the court's refusal to send the case here before final trial, for, being a criminal case, the demurrer was not waived by going to trial on the merits, and the respondent could be heard on his demurrer as well after as before trial in county court.

State v. Bosworth, 74 Vt. 315, 52 Atl. 423; *State v. Perkins*, 88 Vt. 121, 92 Atl. 1.

Judgment that there is no error and that the respondent take nothing by his exceptions. Let execution be done.

H. T. SEAVER, R. P. WEBSTER, AND W. W. REIRDEN v. LILLIA A. LANG AND TRUSTEES.

January Term, 1918.

Present: WATSON, C. J., HASELTON, POWERS, and TAYLOR, JJ.

Opinion filed November 19, 1918.

Executory Contract for Purchase of Real Estate—Remedies of Vendor—Measure of Damages—Pleading—Common Counts—Amendment—Contracts of Married Women—Common Law—Statute—Sole and Separate Estate—Purchase of Real Estate—Surety for Husband—Trial—Motion for Verdict by Both Parties—Questions for Jury—Wife as Husband's Agent—Agent's Individual Liability—Evidence Outside of Issues.

The vendor in an executory contract under seal for the purchase of land containing an absolute promise to pay the purchase price, and where the vendee is in possession, can maintain an action for the recovery of the purchase money under an appropriate common count.

In such case, the vendor is not confined to an action of damages for the breach of the contract, but can proceed in equity, can bring ejectment, can sue for general damages, or he can sue for the purchase money.

In such case, it was not error for the court, after the verdict and before judgment, to permit the plaintiffs to amend their declaration by filing an appropriate common count.

A married woman can make contracts and bind herself and property at law only so far as the statute authorizes her to do so.

When a married woman enters into a contract affecting her property not held to her sole and separate use, her responsibility is to be measured by the common law, and not by the statute.

The real estate of a married woman is not held to her sole and separate use, except where there is some provision so limiting it in the contract, deed, or decree by which she acquires it.

Under G. L. 3521, a married women may buy real estate on credit and bind herself for its payment, and that she has no separate estate does not affect her personal liability.

Where it is claimed that a debt contracted by a married woman is in fact the debt of her husband, the real purpose and character of her undertaking rather than its form controls, and unless the debt became hers by reason of a valid consideration moving to her, it remains the husband's, and her obligation is in its essence that of suretyship.

Where the defendant and her husband deeded his land to the plaintiffs in consideration of their paying his debts, and they gave the defendant a contract by which they agreed to sell, and she to buy, the land for a sum specified as the amount of his debts, the debt so contracted by her was her debt, and not her husband's and therefore void under G. L. 3523, if the arrangement between herself and her husband was that she could have what she could save out of the property, and she contracted with the plaintiffs with that end in view, and on her own account, and for her own benefit.

It is not enough that each party moved for a verdict to establish a consent that the court might take the case from the jury, but it must affirmatively appear that neither party wished to go to the jury. Grounds for granting a motion for a verdict, which were not made below, will not be considered under an exception to the refusal to grant the motion.

A married woman, acting for her husband, a disclosed principal, may bind herself by a contract in her own name.

It is not error to exclude evidence of matters wholly outside the issues made by the pleadings.

ACTION OF CONTRACT on a land contract. Plea, the general issue. Trial by jury at the March Term, 1917, Orleans County, *Fish*, J., presiding. At the close of all the evidence both parties moved for a directed verdict, and the court directed a verdict for the plaintiffs. The defendant excepted. The opinion states the case.

Williams & Smith and *Frank D. Thompson* for the defendant.

In executory contracts for the sale of land where there is a breach by the vendee, the vendor is not entitled to recover the amount of the purchase money as damages, but his damage is the difference between the price he was to receive and the value of the land left on his hands. *Laird v. Pim*, 7 M. & W. 474, 478; *Telfener v. Russ*, 145 U. S. 522; *Sawyer v. McIntyre*, 18 Vt. 27; *Old Colony R. R. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394; *Griswold v. Sabin*, 51 N. H. 167, 12 Am. Rep. 76.

If the purpose of the new count was to enable the plaintiffs to recover for the breach of an executory contract, it was error to allow the plaintiffs to amend their declaration in this respect, as it stated a new cause of action. *Brodek & Co. v. Hirschfeld*, 57 Vt. 12; *Estabrooks v. Fidelity Mut. Fire Ins. Co.*, 74 Vt. 202; *Derosia v. Ferland*, 83 Vt. 372.

The general rule is that a married woman's common-law disability to contract still exists, except as it has been expressly removed by statute. 13 R. C. L. 1268; *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200; *Harvard Pub. Co. v. Benjamin*, 84 Md. 333, 57 Am. St. Rep. 402; *Roop v. Real Estate Investment Co.*, 132 Pa. 496, 7 L. R. A. 211; *Bank of Commerce v. Bowers*, 14 Idaho 75, 17 L. R. A. (N. S.) 676; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *Lord v. Parker*, 3 Allen 127.

Where both parties moved for a directed verdict, and the court granted the motion of one party, unless it affirmatively appears that neither party wished to go to the jury, the case stands before this Court the same as though the prevailing motion for a verdict was the only one presented to the court below. *Fitzsimmons v. Richardson*, 86 Vt. 229; *Woodsville, etc., Bank v. Rogers*, 82 Vt. 468.

And, if there is any evidence tending fairly and reasonably to support the claim of the other party, the case must be reversed. *Latremouille v. Bennington & Rutland Ry. Co.*, 63 Vt. 336; *Lindsay v. Lindsay*, 11 Vt. 621; *Noyes v. Rockwood*, 56 Vt. 347; *Bass v. Rublee*, 76 Vt. 395; *Breese v. McCann*, 52 Vt. 498; *Smith v. Town of Franklin*, 61 Vt. 385; *Manley v. Delaware & Hudson Canal Co.*, 69 Vt. 101; *Empire State Cattle Co. v. Atchison, etc., R. Co.*, 210 U. S. 1, 52 L. ed. 931.

Where evidence is given tending to prove a material fact, it is error for the court to adjudge it insufficient, and direct a verdict. *Jones v. Booth*, 10 Vt. 268; *Fairbanks v. Nelson*, 56 Vt. 657.

Since the defendant's husband was away from home and she was in charge of his affairs so far as she could look after them, and since the subject-matter of the transaction was all his, and since she and Reirden were in constant communication with him concerning the same, the presumption is that, in what she did, she was acting as agent for her husband. *Felker v. Emerson*, 16 Vt. 653; *Meador v. Page*, 39 Vt. 306; *Brown v. Woodward*, 75 Conn. 254, 53 Atl. 112; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 385.

If, when the defendant executed the contract, the plaintiffs knew she was acting as agent for her husband, and the contract was within the scope of her authority, she is not liable although the contract was made in her name. *Roberts v. Button*, 14 Vt. 195; *Hall v. Huntoon*, 17 Vt. 244; *Abbott v. Cobb*, 17 Vt. 593; *Alexander v. Bank of Rutland*, 24 Vt. 222; *Landon v. Proctor*, 39 Vt. 78; *Johnson v. Cate*, 77 Vt. 218.

W. W. Reirden and E. A. Cook for the plaintiffs.

POWERS, J. In the spring of 1914 the late Frank Lang held title to certain property in Barton. It consisted of a village lot and residence thereon occupied by him and his family, called the home place; a barn on the Fair Ground near by, called the Holder barn, and a pasture called the Brown pasture. He also owned two valuable horses, one a mare called Delisle, and the other a stallion called Childs. This property was all mortgaged to the Barton Savings Bank & Trust Company to secure Lang's debts to the amount of over \$4,000. He owed other notes and bills to various parties, on some of which suits had been brought and his equity in the property mentioned or some of it attached. With his affairs in this situation, he accepted a position in Minnesota, and went there, leaving his wife and family in Barton living in the home place. Soon after his departure other attachments were put onto his property, and finally Mrs. Lang, the defendant, set herself to the task of straightening out the tangle in her husband's affairs, and saving what she could out of the property. After some discussion, the following arrangement

was entered into between the plaintiffs and Mrs. Lang, who, as evidence tended to show, acted upon the authority and approval of her husband: Mr. Seaver took the Brown pasture at \$1,250, and he and Mr. Reirden, took the Holder barn at \$1,500; both these sums being paid partly in money and partly in cancelled debts against Lang. The money involved was used to pay other debts against him. These two properties were conveyed by deed and the transactions were final. Then Lang and his wife deeded the home place to Seaver, who immediately conveyed a third interest therein to each of the other plaintiffs. The latter, having paid or assumed the other Lang debts, gave Mrs. Lang a land contract for the home place, which she had occupied all the time, and which she continued to occupy until her death as hereinafter stated. The foregoing arrangement was one transaction only; the deed of the home place and the contract to Mrs. Lang being successive steps in it. The contract was nothing more than an arrangement to secure the amount specified as the purchase price therein. By its terms the plaintiffs agreed to sell to Mrs. Lang, and she agreed to buy, the home place for \$4,492.83, payable on demand with interest annually. The plaintiffs agreed therein that on payment of this sum and compliance with her other agreements therein, they would convey to Mrs. Lang the premises by warranty deed. The amount specified as the purchase price was the remainder of the Lang debts, paid or assumed by the plaintiffs, as they then figured it.

Lang died in 1916, and left an insurance, \$1,500 of which was payable to Mrs. Lang. This suit is brought for the recovery of the sum specified as the purchase price in the land contract, and the insurer is summoned as trustee. Mrs. Lang died after the trial below, and her administrator is here defending. The declaration was in the common counts, and the plea was the general issue. The court below ordered a verdict for the plaintiffs, and the case is here on the defendant's exceptions.

When the land contract was offered in evidence, the defendant objected on the grounds that it was an executory contract, merely, and that it was under seal, for each of which reasons recovery could not be had under the common counts. On the first of these propositions, the defendant cites *Hemenway v. Smith*, 28 Vt. 701. Just what the Court decided in that case was this: That the plaintiff there could not recover the amount which the defendants agreed to pay him for an assignment of an

executory contract of purchase of the so-called Gould farm, under a declaration containing only the general counts there used. But it appears that these were only three in number, one for money had and received, another for use and occupation, and the third for money lent and accommodated. None of these was adapted to a case of the kind then at bar. So the decision goes no further than the one in *Wertheim v. Fidelity & Casualty Co.*, 72 Vt. 326, 47 Atl. 1071. The origin and growth of the so-called common counts form an interesting chapter in the development of our system of pleading; but it is enough here to say that new counts have been from time to time added to the common counts until there is now in use, in some parts of the State at least, a printed form containing a general count adapted to a case of this kind. It must be admitted that this declaration did not originally contain any such count. But this defect was remedied by an amendment.

In this connection, it is further urged that a vendor's remedy at law in a case like this is an action for damages for the breach of the executory contract, and that the sum specified cannot be recovered, but only damages represented by the difference between the purchase price and the value of the premises. There are cases apparently holding this doctrine. So far as these are at hand, they are cases where the vendor retains the possession. In such cases the rule just referred to may afford compensation. But where the vendee takes and retains possession, and the promise to pay is positive and absolute, and the position of the parties is unaffected by foreclosure or other proceedings, recovery of the purchase price should be allowed. To refuse it would be to ignore the plain terms of the engagement. The contract before us contains a direct and absolute promise to pay. In such a case we assert the rule approved in *Waite v. Stanley*, 88 Vt. 407, 92 Atl. 633, taken from *Hansbrough v. Peck*, 5 Wall. 497, 18 L. ed. 520. When Mrs. Lang defaulted, the plaintiffs had several remedies available: They could proceed in equity, as was done in *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042; they could bring ejectment, as was done in *Reynolds v. Bean*, 91 Vt. 247, 99 Atl. 1013; they could sue for general damages, as was done in *Allen v. Mohn*, 86 Mich. 328, 49 N. W. 52, 24 Am. St. Rep. 126; or they could sue for the purchase money. See *Arbuckle v. Hawks*, 20 Vt. 538.

Assuming that the plaintiffs had done all that the contract required of them, there was nothing for the defendant to do but pay the money. Under our simplified system of pleading, if not before, this could be recovered under an appropriate general count. Such a count was allowed to be filed as an amendment to the original declaration. No question as to the sufficiency of this new count is before us, as the only exception saved was to the action of the count in allowing it to be filed. And in this there was no error. G. L. 1796.

Nor can the contention be sustained that the damages are to be measured by the difference between the value of the premises and the purchase price. The damages are compensatory. Whatever the rule might be when a purchaser surrenders the possession or the vendor secures it, when, as here, the purchaser holds the possession and manifests a purpose to continue to hold it, the recovery is the amount due on the contract.

At the close of the evidence, the defendant moved for a verdict, and the motion being overruled, excepted.

One of the grounds relied upon in support of this motion is that the defendant, being at the time a married woman, and it not being provided in the contract that the home place was to be conveyed to her sole and separate use, was incapable of making this executory contract and thereby binding herself and her property.

In the consideration of the question thus raised, it must constantly be kept in mind that a married woman can make contracts and bind herself and property at law only so far as the statute authorizes her to do so. Nor should we forget that our holdings are that, when a married woman enters into a contract affecting property not held to her sole and separate use, her responsibility is to be measured by the common law and not by the statute. *Rowley v. Shepardson*, 83 Vt. 167, 74 Atl. 1002, 138 Am. St. Rep. 1078; *First Nat. Bank v. Bertoli*, 87 Vt. 297, 89 Atl. 359, Ann. Cas. 1917 B, 590; *Barrows v. Dugan's Estate*, 88 Vt. 441, 92 Atl. 927; *French v. Slack*, 89 Vt. 514, 96 Atl. 6.

The determinating question then is this: Is this contract one affecting property not held to the sole and separate use of the wife within the meaning of this rule?

That the home place was not then or thereafter to become property held to the sole and separate use of Mrs. Lang is apparent; for the real estate of a wife is not so held except it be

that there is some provision so limiting it in the contract, deed, or decree by which she acquires it. *Ainger v. White's Admx.*, 85 Vt. 446, 82 Atl. 666. That a married woman was not, at common law, liable upon an executory contract like this, is not to be doubted. 13 R. C. L. 1281; *Warren v. Costello*, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; 1 Benj. Sales, § 34. This resulted from her general incapacity to contract, under which she could not create a valid debt against herself (*Farrar v. Bessey*, 24 Vt. 89), or ratify one thus attempted, after she became single. *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762.

But under our statute (G. L. 3521) the capacity of a married woman to make contracts is general. Capacity is the rule, and incapacity the exception. She may contract like a single woman, except as forbidden by the statute (*Bartholomew v. Allentown Nat. Bank*, 260 Pa. 509, 103 Atl. 954; *Anderson v. Citizens' Nat. Bank*, 38 Ind. App. 190, 76 N. E. 811), and except as forbidden by the holdings referred to. *Barrows v. Dugan's Estate*, *supra*. Under such a statute,—the last-named exception aside,—a married woman may buy real estate on credit and bind herself for its payment (21 Cyc. 1318), and the fact that she did not have a separate estate would not affect her personal liability. *Barrows v. Dugan's Estate*, *supra*.

An examination of our cases above referred to shows that they are founded upon the necessity of protecting the marital rights of the husband in the real estate of the wife. Such rights are still recognized and protected, and cannot be taken away without his consent. But, unless this contract was valid, the husband never acquired any marital rights under it. To assert that his marital rights attached to the home place under the contract here in question is to assert the validity of that contract. If the contract is not valid, it is wholly void. If it is to be tested by common-law rules, it is void, and not voidable. *Hayward v. Barker*, *supra*. And if the contract is void as to Mrs. Lang, it is void as to these plaintiffs (13 R. C. L. 1254), and void as to everybody whose rights would be affected by it if valid (6 R. C. L. 591; *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588), and Lang acquired no marital rights under it. It is not necessary, then, in order to protect the husband's rights here to declare this contract to be void for want of capacity, and the case does not come within the spirit of our previous holdings.

It was also claimed under this exception that this contract was not binding upon Mrs. Lang, because she thereby became holden for her husband's debt, which is expressly prohibited, except by way of mortgage, by P. S. 3039 (G. L. 3523).

In examining this question, attention is to be given to the real purpose and character of the undertaking rather than its form. *First Nat. Bank v. Bertoli, supra*. As we have already seen the sum specified as the consideration of the contract was the unpaid balance of Lang's debts. This was what Mrs. Lang agreed to pay. Her evidence tended to show that the entire arrangement was made by her under directions from her husband and for his benefit. That she gave her own promise or obligation, instead of his or a joint one, is unimportant. Unless the debt became her debt, by some arrangement based upon a valid consideration moving to her, it remained his, and her obligation is in essence that of suretyship. *Bank v. Bertoli, supra*.

But the evidence on this branch of the case was not all one way. There was evidence tending to show that Lang told the defendant that she could have what she could save out of the property. If this was the arrangement between herself and her husband, and she contracted with the plaintiffs with that end in view and on her own account, and for her own benefit, then the debt was hers, and not her husband's, though it resulted or was to result in the payment of his debt. In such circumstances, after the contract with the plaintiffs, Lang's rights in the property were marital, only; whereas prior to that contract her rights in the property were marital, only. With this conflict in the evidence, it was not error to overrule the defendant's motion so far as it depended upon this point.

The plaintiffs also moved for a verdict at the close of the evidence. Just what took place in this connection is shown by the transcript, which is referred to and made controlling. It was this: The court asked defendant's counsel what question there was for the jury, and the latter replied, "I don't think there is any, if the court takes the view of the law as we do." Then, turning to the plaintiffs, the court asked if they thought there was any question for the jury, and they replied that they did not, and that they joined in the motion and thought a verdict should be ordered for them. Thereupon the court said, "You both agree that there is no question for the jury," and directed the plaintiffs to figure up the amount of their claim. Immedi-

ately, counsel for the defendant explained: "I would like to qualify or withdraw one statement, and that is that I thought there was nothing to be submitted to the jury. What I meant was that the plaintiffs' evidence shows that the defendant, if she assumed anything, it was as surety for her husband, and we also claim that she had no legal capacity to make such a contract in regard to real estate; but if the court says that the plaintiffs' evidence tends to show that she did make a contract which she had a right to do, we say that the defendant's evidence tends to show that she was acting as her husband's agent in executing this land contract and doing what she did; and that is a question which should be submitted to the jury, in addition to our claim which shows that she simply was a surety."

Notwithstanding this, the court asserted that both parties had claimed that there was no question for the jury, and in this view ordered a verdict for the plaintiff. The mere fact that each party moved for a verdict did not amount to consent that the case should be taken from the jury. It is only when it affirmatively appears that neither party wishes to go to the jury that it is for the court to direct such verdict as in its judgment the evidence requires. *Fitzsimmons v. Richardson*, 86 Vt. 229, 84 Atl. 811. In the case before us it did not affirmatively appear that both parties assented to the proposition that there was nothing for the jury. The court was mistaken in its assertion that they agreed on this question. The defendant's assent was conditional. When her counsel saw the misapprehension of the court he immediately explained his position, fully and clearly. He was in a position to insist that the question of Mrs. Lang's relation to the debt she agreed to pay, should be submitted to the jury, and the question of agency also, if there was any evidence fairly and reasonably tending to establish it.

It is here urged that the contract presented the case of mutual and dependent covenants; that the plaintiffs' engagement to deed and the defendant's promise to pay were dependent; and that no recovery could be had without proof of a tender of a deed or its equivalent. And this is urged as a reason why the defendant's motion for a verdict should have been granted. But the defendant did not make the point below. The grounds of her motion were there made specific. This was not one of them. Therefore, we will not consider it. *Spencer v. Potter's Est.*, 85 Vt. 1, 80 Atl. 821. And for the same reason

the defendant will not now be heard to urge this ground as a reason why the plaintiffs' motion for a verdict should not have been granted.

As we have said, the defendant was, at the close of the evidence, in a position to insist that the question of her relation to this debt be submitted to the jury. But the plaintiffs take the position that she has lost this right through the inadequacy of her exceptions. When the court disposed of the plaintiffs' motion by granting it, the presiding judge addressed the jury, briefly explaining the situation, appointed a foreman, and directed him to sign the plaintiffs' verdict. Following this, an exception was taken by the defendant to the refusal of the court "to submit the question of agency to the jury." So far, then, no question but that of agency was saved. But after the verdict had been read by the clerk, another exception was taken, which must have been to the granting of the plaintiffs' motion for a verdict and which was unrestricted. In so construing the record before us, we are not unmindful of the rule that a bill of exceptions is to be construed against the excepting party. But it is to be construed reasonably, and in a way to preserve the rights of all parties so far as its language permits. From the course of the trial, the position taken and adhered to by the defence, and the unrestricted statements of the bill itself, the only reasonable construction of this record is the one we have adopted. For the reasons hereinbefore stated, this exception is sustained.

It was not error to refuse to submit the question of agency. There are, here and there in the transcript, statements which, taken by themselves, could be taken as indicating an agency on the part of Mrs. Lang; but the evidence as a whole is not subject to that interpretation. One acting for a disclosed principal may, if he chooses, bind himself. *Bradley v. Blandin*, 89 Vt. 542, 95 Atl. 894. And he does bind himself when, as here, the contract is in writing, and in clear unambiguous language purports to be the engagement of the agent and not the principal. Story, Agency, Par. 269, *et seq.*; 2 C. J. 814; 21 R. C. L. 848; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Arfridson v. Ladd*, 12 Mass. 173; *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.) 402, 43 Am. Dec. 681.

In the contract before us, the promise is Mrs. Lang's, not Mr. Lang's; the signature is hers, not his; the seal is hers, not his. *Freeman v. Barron's Estate*, 92 Vt. 462, 105 Atl. 255.

There was no error in excluding the evidence regarding the profits made by the plaintiffs on the property when sold. This was wholly outside the issues made by the pleadings and therefore inadmissible. *Brown v. Aitken*, 90 Vt. 569, 99 Atl. 265.

Judgment reversed and cause remanded.

GARDNER B. ARNOLD v. E. X. SOMERS, F. M. ABBOTT, CHARLES WEEKS, W. J. ALDRICH, A. P. LADD, J. E. ALEXANDER, AND AMERICAN NEWS VENDING COMPANY.

May Term, 1917.

Present: WATSON, C. J., HASELTON, POWERS, TAYLOR, and MILES, JJ.

Opinion filed November 13, 1918.

Conspiracy—Harmless Error—Limiting Evidence—Excluding Evidence—Fraud—Actionable Fraud—Misrepresentations not Actionable—Connection with Damage—Whether Expression of Opinion or Assertion of Fact for Jury—Caveat Emptor—Evidence—Damage—Jury Question—Principal and Agent—Interest of Agent—Principal Liable for Agent's Fraud—Respondeat Superior—Corporation Officer not Liable for Agent's Fraud—Immaterial Evidence—Ground not Claimed Below not Considered—Defence—Evidence of Property Owned—Instructions—Not Misleading—Requests—Property Refused—Element Omitted from Request—Request as to Matter not in Issue.

In a buyer's action for fraud in the sale of manufacturing rights in a patented vending machine, in which the defendants were charged with a conspiracy to defraud him, the question of a conspiracy was important only as it gave character to the individual acts of the defendants, and charged all with the legal consequences of such acts.

Limiting certain of plaintiff's evidence to one defendant only was harmless error, where similar evidence had already been received without objection or limitation, and the jury found in favor of the other defendants on the claim of conspiracy.

It was harmless to exclude a question asked one of the defendants on cross-examination as to his knowledge of a certain fact when, in further cross-examination, it inferentially appeared that he had no knowledge of such fact.

To constitute "actionable fraud" in the sale of property by false representations, the representations must be of existing facts relating to the subject-matter of the contract and affecting its essence and substance, made as inducement, false to the maker's knowledge when made, or made of his own knowledge without knowing them to be true, not known to the purchaser to be false, and relied upon by him to his damage.

In a buyer's action for fraud in the sale of the manufacturing rights of a patented vending machine, wherein the seller's salesman was to have a half interest which was paid for by his commission on the sale, of which fact the plaintiff was ignorant, the salesman's representations to the plaintiff that he had the means to pay for a half interest in the rights and would pay cash for the same, were not actionable, because they did not relate to the subject-matter of the contract, and there was no casual connection between them and the damages claimed to have been suffered.

It appearing that the vending machine had a structural defect which materially affected its value, the question whether a representation that the machine was perfect and the best of its kind in existence, was an expression of opinion or an assertion of fact, was for the jury.

The essential elements of fraud having been established, the rule of *caveat emptor* did not apply.

Evidence that the plaintiff had the opportunity, which was exercised, to examine the machine and its operation bore only upon the question whether he relied upon the false representations and was deceived thereby.

The plaintiff disposed of the manufacturing rights to a corporation at a profit by taking stock in payment, and there was evidence that the corporation became bankrupt because the rights were valueless. *Held*, that whether the alleged fraud resulted in damage to the plaintiff was a jury question.

Every agency is subject, as matter of law, to the legal limitation that it cannot be used for the benefit of the agent himself, or of any person other than the principal, in the absence of an agreement that it may be so used.

There being evidence that the selling corporation, with knowledge that its salesman was personally interested in the sale of the rights, authorized him to act as its agent in the negotiations with the plaintiff, the question of its liability for the false representations of its salesman was properly submitted to the jury.

There being no evidence to connect the president of the selling corporation with its salesman's fraud, he was not liable under the doctrine of *respondeat superior*; the salesman not acting as his agent.

The admission of evidence on cross-examination of the corporation's president, objected to as immaterial, that, at the time the contract for the sale of the rights was executed, the corporation's book containing the record of its director's vote to pay the salesman a commission for the sale of rights, was in the company's safe, and that, so far as the witness knew, the plaintiff knew nothing of the record, and that it was not called to his attention, was harmless because the record was later admitted in evidence without objection.

The admissibility of excluded evidence on a ground not claimed below, will not be considered.

Evidence that the machine in question was as perfect or more perfect than the other machines on the market used for a like purpose, was properly excluded; it being no defence that the machine was not more defective than like machines.

Evidence of the amount of property owned by the salesman at the time of the sale of the rights was admissible under the allegation that he represented that he had sufficient means to purchase one-half of the rights.

An instruction that the jury "will inquire whether there is any evidence tending to show conspiracy or fraud," and another, referring to certain evidence, "does that evidence tend to show fraud and conspiracy?" when considered with the rest of the charge, would not mislead the jury to believe that it was only necessary for them to find evidence tending to show fraud or conspiracy, to find a plaintiff's verdict.

A request for an instruction that no misrepresentation is fraudulent unless made with the knowledge of its falsity, and such knowledge

cannot be presumed from the mere falsity of the representation, was properly refused because it ignored false representations made as of one's knowledge without in fact knowing them to be true.

A request for an instruction as to a ground of recovery not claimed by the plaintiff was properly refused.

ACTION on the case for fraud. Plea, the general issue. Trial by jury at the March Term, 1916, Chittenden County, *Stanton, J.*, presiding. Verdict and judgment for the plaintiff against defendants E. X. Somers, J. E. Alexander, and American News Vending Machine Company. Verdict directed for the defendant Charles Weeks. Judgment on the verdict. Verdict and judgment for the defendants W. J. Aldrich, A. P. Ladd, and F. M. Abbott. Plaintiff and defendants both excepted. The opinion states the case.

V. A. Bullard and *Sherman R. Moulton* for the plaintiff.

The evidence excluded as against defendants Aldrich, Abbott and Ladd was admissible. Whatever is done by one conspirator, in the furtherance of the common scheme, is admissible against all his co-conspirators. *Jenne v. Joslyn*, 41 Vt. 478; *Patch Mfg. Co. v. Protection Lodge*, 77 Vt. 294.

A corporation may be liable in an action of conspiracy, although it can act only through its agents. *Aberthaw Const. Co. v. Cameron*, 194 Mass. 208, 80 N. E. 473; 120 Am. St. Rep. 542; *West Va. Transport Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804; *Zinc Carbonate Co. v. First National Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845. And see cases in note 12 L. R. A. 196.

Charles H. Darling and *Porter, Witters & Harvey* for the defendants.

The fraudulent representations of the vendor in a contract of sale do not afford a basis for an action unless the representations relate to the quality, quantity, or value of the article sold. *Stone & Wellington v. Robie*, 66 Vt. 245; *First Nat. Bank v. Yokum*, 11 Neb. 328, 9 N. W. 84.

Representations of facts which will exist in the future or promises or matters of judgment or opinion, though false and intended to deceive, do not form the basis of actionable fraud. *Hunt v. Lewis*, 87 Vt. 528; *Shanks v. Whitney*, 66 Vt. 405.

Statements merely descriptive of the operation and utility of an invention or patented article are generally regarded as mere expressions of opinion or "dealer's talk," upon which a purchaser cannot safely rely. *Neidefer v. Chastin*, 71 Ind. 363, 36 Am. Rep. 198; *Kimball v. Bangs*, 144 Mass. 321, 11 N. E. 113; *Deming v. Darling*, 148 Mass. 504, 2 L. R. A. 743; *Kernoille v. Hunt*, 4 Blatch. 57; *Bishop v. Small*, 62 Me. 12; *Dillman v. Nadlehoffer*, 119 Ill. 567, 7 N. E. 88; *Miller v. Young's Admr.*, 33 Ill. 54; *Gatling v. Newell*, 12 Ind. 118.

Every person dealing with an officer of a corporation who assumes to act for it in matters in which the interests of the corporation and the officer are adverse is put upon inquiry as to the authority and good faith of the officer. *Leigh v. American Brake Beam Co.*, 205 Ill. 147, 68 N. E. 713; *Farrington v. So. Boston R. R. Co.*, 120 Mass. 406, 15 Am. St. Rep. 222.

The officer of a corporation acting avowedly for himself or on behalf of another with whom he is interested in any transaction, cannot be treated as the agent of the corporation. *Innerarity v. Merchants Nat. Bank*, 139 Mass. 332, 1 N. E. 282; *Roberts v. Hughes & Co.*, 86 Vt. 76; *Finckle v. Hudson*, 82 Ala. 158; *Allen v. So. Boston Ry. Co.*, 150 Mass. 200, 5 L. R. A. 176; *Gunster v. Scranton, Etc., Co.*, 181 Pa. 327, 37 Atl. 550; *Merchants Nat. Bank v. Lovett*, 114 Mo. 519, 25 Am. St. Rep. 770; *Stratton v. Allen*, 16 N. J. Equity 229; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Equity 33; *First Nat. Bank v. Christopher*, 40 N. J. Law. 435.

TAYLOR, J. The plaintiff sues for damages for fraud in the sale to him of certain rights in a patented vending machine known as the "Eureka Vendor." The defendants are the American News Vending Machine Company, the holder of the letters patent of the machine; E. X. Somers, at the time in question its president and general manager; J. E. Alexander, a commissioned salesman of stock and state rights of the company; A. P. Ladd, F. M. Abbott and W. J. Aldrich, members of its board of directors; and Charles Weeks, a stockholder. The trial was by jury. The court directed a verdict for Weeks and over-

ruled a motion for a directed verdict for the other defendants. The jury returned a verdict for the plaintiff against the company, Somers and Alexander and in favor of the defendants Ladd, Abbott and Aldrich. The plaintiff and the defendants that were held bring exceptions.

In his declaration plaintiff charges a conspiracy among the defendants to defraud him by false representations in the sale to him of the right to manufacture and sell said Eureka Vendor in the state of New York. Several fraudulent representations are alleged as a basis of recovery, but only two were relied upon and submitted to the jury as supported by the evidence. It may be noted in passing that the question of a conspiracy in such an action is important only as it gives character to the individual acts of the parties to it and charges all with the legal consequences of such acts. Note, Ann. Cas. 1914 C, 764. See *Saxe v. City of Burlington*, 70 Vt. 449, 41 Atl. 438.

It appeared that prior to January, 1912, Alexander was engaged by the American News Vending Machine Company, hereafter called the "company," in selling the stock of the corporation on commission. On January 10, 1912, he entered into a contract with the company to sell state rights to manufacture its vending machines on a fifty per cent. commission. His business for the company took him to Barre, Vermont, in September, 1912, where he first met the plaintiff. He interested the plaintiff in the vending machine and first sold him some of the stock of the corporation. Later he directed plaintiff's attention to the matter of state rights and expressed a desire to find some one who would purchase the right for the state of New York with him. He found the plaintiff favorably inclined and proposed to ascertain the smallest amount for which the right could be bought. During the negotiations he showed the plaintiff a list of the maximum and minimum prices asked by the company for each state right outside of New England, the minimum for New York being about \$22,000. Alexander secured from Somers, who had authority from the directors to fix the price of state rights within certain limits, a proposition for the New York right at \$12,000 and certain royalties on the machines manufactured and \$2,000 for the necessary manufacturing equipment. Later he met the plaintiff and submitted the proposition. After some talk it was arranged that the plaintiff should visit the factory of the company at St. Johnsbury. Accordingly plaintiff

visited the factory with Alexander, met Somers who showed him around and explained the working of the vending machine, and he thereupon decided to purchase the right with Alexander. In due time the contract was executed, and plaintiff paid his share of the first installment of the purchase price. Subsequently, as the deferred payments except the last came due, plaintiff handed Alexander his check drawn to the company for his share and later received from Alexander, or was shown by him, the company's receipt for the whole payment. Plaintiff's share of the final payment was made in person to Somers, and a receipt for the final payment in full was given. As a matter of fact, Alexander actually paid no money to the company on account of his share; his proportion being represented by commissions on the sale of the right. The entries on the books of the company, made under Somers' direction, treated the whole amount as received in cash and an amount equal to his commission paid out to Alexander. Pursuant to an arrangement contemplated in their contract with the company, Alexander and the plaintiff organized a corporation to which they transferred the New York rights, receiving therefor stock of the corporation of the par value or \$26,000.

One of the alleged fraudulent representations on which the case was submitted to the jury was that Alexander stated to the plaintiff that he had the means to pay for a half interest in the right and tool equipment at the price of \$14,000 and would purchase the same with the plaintiff and pay cash for his half of the price. The other was that Alexander represented to the plaintiff that the Eureka vending machines, as then being manufactured, were perfect and the best of their kind in existence.

We will first examine the plaintiff's exceptions. He was permitted to testify as against Alexander alone that he would not have entered into the contract to purchase the New York rights if he had known that Alexander was to pay nothing. He objected seasonably to the limitation, and now insists that it was error which should reverse the judgment in favor of defendants Aldrich, Abbott and Ladd. He had already testified without objection or limitation that in making the contract he relied upon the fact that Alexander was paying for his share of the right in cash. Besides, the jury found against him on his claim of a conspiracy involving these defendants on which he

relies to sustain the admissibility of this evidence against them, so his rights were not prejudiced by the limitation.

The plaintiff also excepted to the exclusion of the question asked defendant Aldrich in cross-examination, whether he knew of any action by the board of directors whereby Alexander was to receive a commission for selling the New York right to himself. But in further cross-examination plaintiff developed the fact that Aldrich knew of no arrangement with Alexander except the contract of January, 1912, which he had already testified about; so the exclusion of the question was harmless.

Plaintiff's exceptions are without merit.

We take up the defendants' exceptions in the order in which they are briefed. At the close of plaintiff's evidence and again at the close of all the evidence, the defendants severally moved for a directed verdict on various specified grounds. They argue three of the grounds under their exception to the action of the court in overruling their motions, *viz.*: (1) That there was no evidence that the defendants or any of them made any misrepresentations as to the quality, quantity, or value of the thing sold; (2) that there was no fraud practiced upon the plaintiff; (3) that there was no evidence that the plaintiff suffered any damage because of the alleged misrepresentations of the defendants or any of them.

The rule is well settled that to constitute actionable fraud in the sale of property the representations must be of existing facts relating to the subject matter of the contract and affecting its essence and substance, made as inducements to the contract, the representations being false and at the time known by the one making them to be false, or made of his own knowledge without in fact knowing them to be true, not open to knowledge of or known by the purchaser and relied upon by him in making the purchase to his damage. *Hunt v. Lewis*, 87 Vt. 528, 530, 90 Atl. 578, Ann. Cas. 1916 C, 170, and cases cited. Tested by this rule, the plaintiff was not entitled to recover on Alexander's representation that he had the means to pay for a half interest in the rights and property and would pay cash for the same. The representations, if made, did not relate to the subject-matter of the contract, but were merely collateral thereto and in part only promissory. Besides, on the evidence there was no causal connection between the alleged representations and the damage which plaintiff claimed to have suffered. See *Brackett v. Gris-*

wold, 112 N. Y. 454, 469, 20 N. E. 376; *Silver v. Frasier*, 3 Allen (Mass.) 382, 81 Am. Dec. 662, 21 Cyc. 137. He paid no more than he expected to pay and received all that he expected to receive. The loss, if any, on account of the venture was in no way attributable to the fact that Alexander did not pay for his interest in cash.

The defendants contend that the representation that the machines, as then being manufactured, were perfect and the best of their kind in existence, was an expression of opinion merely and so would not afford the basis of actionable fraud. Assuming that such a representation would ordinarily be a matter of opinion and for that reason not deemed fraudulent, the circumstances may be such that a representation based upon opinion will be fraudulent. If it is made as an assertion of fact with the purpose that it shall be so received, and it is so received, it may amount to a fraud. *Crompton v. Beedle*, 83 Vt. 287, 298, 75 Atl. 331, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912 A, 399. We think that the evidence here made this a jury question, as it generally, though not always, is. *Belka v. Allen*, 82 Vt. 456, 462, 74 Atl. 91.

There was evidence fairly tending to show that fraud upon the plaintiff was practiced by Alexander. The making of the representation as to the quality of the machines was not controverted. It was admitted that they had a structural defect, and there was evidence that the defect materially affected their value. There were circumstances fairly tending to show that this representation was made and received as a representation of fact. No question is made but that as to him the other essential elements of actionable fraud were supported by the evidence.

It is urged as defeating plaintiff's right of recovery that he had an opportunity, which was exercised, to examine the machine and its operation and that the rule of *caveat emptor* applies. Such is not the doctrine of our cases. The evidence referred to in support of this claim bore upon the question whether the plaintiff relied upon the representation and was deceived thereby. But when the essential elements of a fraudulent representation are established, it is no excuse for the defendant, nor does it lie in his mouth to say, that the plaintiff might, but for his own neglect, have discovered the wrong and

prevented its accomplishment. *Maidment v. Frazier*, 90 Vt. 520, 527, 98 Atl. 987, and cases cited.

As to the last ground of the motion, it is urged that on all the evidence the plaintiff disposed of the rights and property at a profit, and any damage which he suffered was due to the mismanagement of the corporation whose stock he took in payment. It is not enough that the plaintiff received for the property purchased stock of a par value in excess of what he paid. The value of the stock was affected by the value of the right which it represented. While there was evidence tending to show that the New York corporation became bankrupt through mismanagement, other evidence tended to show that the right was worthless and that the failure of the corporation was due to this fact. Whether the fraud resulted in damage to the plaintiff became a jury question.

We hold that Alexander's motion for a directed verdict was properly overruled.

The liability of the defendant company depended upon its relation to Alexander at the time he was negotiating with the plaintiff for the purchase of the rights. It cannot be doubted that the plaintiff knew that Alexander was the company's agent for the sale of state rights and that he expected to benefit personally by the transaction. This knowledge so affected the situation that the company would be relieved of the ordinary liability of a principal for the acts of its agent on account of Alexander's representations in effecting the sale to himself and the plaintiff, unless, with knowledge of the facts, the company permitted him to continue to act as its representative. Every agency is subject to the legal limitation that it cannot be used for the benefit of the agent himself, or of any person other than the principal, in the absence of an agreement that it may be so used; and as this is a matter of law and not of fact, all persons must take notice of it. 21 R. C. L. 910. See *Roberts v. Hughes*, 86 Vt. 76, 87, 83 Atl. 807. The false representations in such circumstances are no less fraudulent, but liability therefor is not visited upon the one for whom the agent assumes to act unless the agency is continued in force by special agreement. But, if the agent's authority is thus continued, there is no valid reason why the principal should not be held to incur ordinary liability for his acts.

Thus it is seen that the question here is not controlled by the fact that Alexander was the company's agent generally for

the sale of state rights, but depends upon whether there was evidence tending to show that the company, with knowledge that Alexander was personally interested, authorized him to act as its agent in the negotiations with the plaintiff. There was ample evidence to show that in conducting such negotiations Alexander was acting within the scope of his employment, and the motion of the defendant company for a directed verdict was properly overruled.

As to defendant Somers, Alexander was not acting as his agent and the doctrine of *respondeat superior* has no application. Our attention is called to no evidence tending to show that Somers made or authorized the representations, nor that he knew of their being made. Plaintiff relies upon the claim of a conspiracy between Alexander and Somers to defraud the plaintiff, thereby making Somers liable for Alexander's acts in furtherance of the conspiracy.

The evidence relied upon to show conspiracy is wholly circumstantial, and it remains to consider whether it has the tendency claimed for it. It is argued that the claim is supported by the following facts: Somers was the president of the corporation and knew that a contract had been entered into with Alexander for the sale of state rights on a fifty per cent. commission. He did not know whether the plaintiff was aware of this fact and did nothing to enlighten him. He prepared a list of prices for state rights for Alexander's use and later arranged with him to take a smaller sum for the New York right than that named in the list. Under his direction, the books of the company were so kept that it appeared that Alexander had paid his share of the installments of the purchase price in cash and in turn received back the same amount in commission. He sent receipts to the plaintiff when he paid his share of the respective installments which purported to cover the whole installment. He was present when the plaintiff was about to draw a check for his share of the first installment, probably heard Alexander say that he would step into an adjoining room and write his check, and did not inform the plaintiff that Alexander's share was paid in commissions.

These circumstances are too colorless to fairly support an inference of such a conspiracy. The commission contract was entered into before the plaintiff was known to either Somers or Alexander. There was nothing significant about the method

adopted of keeping the account of the transaction. Instead of an attempt, as the plaintiff claims, to conceal the fact that Alexander was paying his share in commissions, if anything, the books evidence the contrary intention. There are no earmarks of fraud in the form of the receipt used, nor in the reduction of the price asked for the right. The intentional concealment of no fact that would have influenced the plaintiff is shown. In the absence of evidence of a conspiracy, there was nothing in the case to connect Somers with Alexander's fraud, and his motion for a directed verdict should have been sustained.

Defendant Somers was called as a witness by the plaintiff. During cross-examination his counsel produced the record book of the defendant company and called attention to certain pages containing a record of the meeting of the directors at which it was voted to pay Alexander a fifty per cent. commission for the sale of rights. Plaintiff's counsel objected to the introduction of the record and asked leave to propound preliminary questions bearing on its admissibility, which was granted. Against the objection that it was immaterial, plaintiff was permitted to show that at the time the contract with the plaintiff and Alexander was made and signed, the book was in the company's safe, that so far as witness knew plaintiff knew nothing of the record, and that it was not called to plaintiff's attention.

If the evidence was immaterial, it was manifestly harmless for the purpose for which it was offered and received, for the court admitted the record in evidence. It is urged that Somers was prejudiced thereby, in that the evidence had a tendency to influence a belief in the minds of the jury that the defendants were attempting to conceal something from the plaintiff. We are not inclined to believe that the jury misunderstood the purpose of the evidence; besides, the disposition of the case as to Somers renders the question academic.

After Somers, who was the inventor of the machine, had explained the defect and testified that it was trivial he was asked, "Were you able to correct that defect by a further study of the machine?" The question was objected to and excluded, when defendants' counsel offered to show that the defect was cured and the machine perfected; "and that these parties got the benefit of it so that they could not claim to be damaged by that, * * * got all the benefit of a perfect machine under their contract." The defendants now argue that the offered evidence

was admissible on the question of damages, that it tended to show that the machine was of much value, and that a little change made it all that it was represented to be. But this was not the claim made below. Their position then was that the subsequent improvement perfected the machine, and that Alexander and the plaintiff had the benefit of the improvement and so had no claim for damages. It was upon this claim that the court ruled in excluding the offer. Defendants' position at the trial was untenable, as their counsel tacitly admit by abandoning it here. If the evidence was admissible on the question of damages, it is too late to make the claim here. The claim accompanying the offer controls and defeats the exception.

Somers having testified that he was to some extent familiar with other vending machines on the market and that such machines were in operation to a considerable extent, was asked, "Do you know whether those machines under the hands of an expert may be manipulated or not?" The question was excluded and an exception noted. Thereupon, defendants' counsel offered to show by the witness that such machines are in common use and that the machine in question was as perfect, or more perfect than the other machines on the market used for like purposes. The offer was excluded and an exception noted. It is urged that the exclusion of the offer was error; that the offered evidence was a direct contradiction of plaintiff's claim as to the character of the machine and tended to show that it was practically as represented. It would not justify the representation that the machines, as then manufactured, were perfect to show that they were not more defective than any other like machine on the market. The claim that the offered evidence bore on the question of damages was not made below, and so is not for consideration.

Alexander was called as a witness by the plaintiff and was asked in direct examination what property he had on October 24, 1912 (the date of the contract), in Vermont. The question was objected to as not within the declaration, and the objection was overruled and an exception noted. Having answered that he did not have any real estate in Vermont, he was then asked, "What did you have in Vermont in the way of attachable property?" to which a general objection was interposed. At the court's suggestion, the question was amended by leaving out "attachable," and without further objection or exception the wit-

ness answered, "I had approximately \$7,000." Treating the question as saved, as counsel have done, the exception is without merit. One of the alleged representations was, in substance, that Alexander had sufficient means to purchase one-half of the New York right. This covered the ground of objection specified. It is unnecessary to consider whether the ruling would be sustained on other grounds.

Each of the defendants excepted to "that portion of the charge in which the court said, in substance, you will inquire whether there is any evidence tending to show conspiracy or fraud"; and again to "that portion of the charge where in referring to the vote of the directors October 28, 1912, giving Alexander fifty per cent. on the sale of tool equipment, the court said, in substance, does that evidence tend to show fraud and conspiracy?" The ground of each exception was that it was for the court, and not the jury, to say what the evidence tends to show.

The nearest approach to the language complained of in the first of these exceptions occurs at the close of a review of the evidence respecting the sale and various prior transactions. The jury was admonished to examine closely all the facts surrounding the sale and prior thereto. Proceeding, the court said: "As I have said, it is not to be guesswork, but you will say whether the circumstances tend to prove a fraud or tend otherwise. You must have established by legal evidence the fact of conspiracy and fraud," etc.

It is urged that in effect the jury was instructed that it was only necessary that they should find evidence tending to show fraud or conspiracy to find a plaintiff's verdict. If the charge was calculated to give the jury any such understanding, it was manifest error. It will be noticed that in neither instance did the court tell the jury that if the evidence tended to show fraud or conspiracy, they should find for the plaintiff. We think that the portions of the charge excepted to should not receive this construction. Where circumstantial evidence is resorted to to prove a fact, it may happen that the isolated circumstances, or some of them, are equivocal. They may or may not support the claim according as they are viewed in the light of the attending circumstances. It is then for the jury to say what significance they will attach to a particular

circumstance in view of all the evidence, or in a sense to decide upon the tendency of that evidence. Wills on Cir. Ev. 422a-422g. This is quite distinct from the ordinary function of the court in ruling upon the tendency of evidence, which cannot be abdicated to the jury without error.

The language employed was not fortunate; but, considering the whole charge, we think that the court intended no more than to leave the significance of the particular circumstances to the jury, and that they were not misled by the language employed. They were elsewhere told that fraud and conspiracy may be proved by circumstances from which the fact could be inferred; and that, if such circumstances were established and were of a character to produce in their minds a conviction of the fact of conspiracy and fraud, they could find that conspiracy and fraud had been proved. Continuing, the court took up certain isolated circumstances and called attention to the conflicting claims as to their bearing on the main issue. It was in this connection that the portions of the charge excepted to occurred. The exceptions do not show reversible error.

✓ The defendants excepted to the failure of the court to charge as requested in certain specified requests. One of these was for an instruction that no misrepresentation is fraudulent unless made with the knowledge of its falsity, and such knowledge cannot be presumed from the mere falsity of the representation. The request was properly denied. In the form presented it was unsound, in that it ignored false representations made as of one's own knowledge without in fact knowing them to be true. The request follows the language of a head note to *Caldbeck v. Simanton*, 82 Vt. 69, 71 Atl. 881, 20 L. R. A. (N. S.) 844. The note omits the important qualification which appears in the opinion, though differently expressed. The charge dealt with the subject matter of the request in a manner not excepted to.

Another request was for an instruction that there was no evidence in the case to prove that Alexander's representations to the plaintiff as to the financial standing of the defendant company were not true. The request was entirely outside the case as it went to the jury. The plaintiff did not claim a recovery on this ground and there was no occasion for the court to refer to the matter. To do so would have been to confuse rather than aid the jury in their deliberations.

The error in overruling defendant Somers' motion for a directed verdict requires a reversal as to him. The other exceptions are not sustained.

Judgment except as to defendant Somers affirmed. As to him, judgment reversed, and judgment that he is not guilty and that he recover his costs.

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Ibid.

To give entry upon land in subordination to another's title adverse character, actual or presumptive notice of an adverse claim must be brought home to the owner. *Ibid.*

Where persons claim under a title by adverse possession based upon a parol gift to their predecessors in title, the burden of proof upon that question, as distinguished from the burden of evidence, is upon them, aided by the presumption that, if there was a gift of the property, their predecessor in title occupied thereunder claiming ownership. *Ibid.*

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§ 1. Decisions Reviewable.

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§ 2. Presentation and Reservation in Lower Courts of Grounds of Review.

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Ground of objection not raised at the trial will not be considered. *Waterman v. Moody*, 218; *In re Martin's Est.*, 362; *Arnold v. Somers*, 512.

An exception to a finding by the chancellor, made upon evidence not excepted to, is without merit. *Waterman v. Moody*, 218.

Signing of bill of exceptions by presiding judge places upon the record questions of law arising upon the trial, and entitles excepting party to consideration of questions properly raised. *Brown v. Vt. Mutual Fire Ins. Co.*, 272.

Question of competency of expert witness is not raised by general objection to his testimony. *Ibid.*

Question of competency of witness to testify as to value is not saved by objection that an inquiry as to value of a certain house "assumed certain things not in evidence." *Ibid.*

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Where the transcript is not referred to, the Supreme Court can only consider what expressly appears in the bill of exceptions. *Ibid.*

Where bill of exception states only what the excepting party claimed and how he treated certain items in dispute, and gives no further information of the evidence or offers in regard thereto, the ruling of the court will not be disturbed. *Hutchins v. George*, 371.

If a party relies upon an exception to a principle announced by the trial court, he should make a definite offer of evidence calculated to take his case out of the general rule; and where it does not appear by the bill of exceptions that such offer was made, the ruling of the court will not be disturbed. *Ibid.*

§ 4. Hearing and Rehearing.

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§ 5. Review.

(A) Generally.

Not error to fail to charge in a manner not applicable to the evidence. *Porter Screen Mfg. Co. v. C. V. Ry. Co.*, 1.

Under the circumstances, the limitation of the right of cross-examination was not error. *Baldwin v. Gaines*, 61.

Not error to admit a question assuming a fact of which there is some evidence, though vague, and where the answer was not based upon it. *Ibid.*

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An exception to a finding based upon a deed received in evidence with the understanding that it should be used only if certain things

- were proved, is without force, when it appears that the understanding was made good. *Waterman v. Moody*, 218.
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- Ruling, for which a wrong ground is suggested, is not error, if in fact correct. *In re Martin's Est.*, 362.
- Where counsel, in good faith, after explaining his claim with regard to evidence offered by him, which was excluded, made a further explanation in the hearing of the jury, who were cautioned by the court not to try the case on statements of counsel, but on the evidence, an exception to such remarks of counsel will not be sustained. *Ibid.*
- A specific exception will not be extended beyond the precise point made below. *Ibid.*
- An exception to a finding of fact which there is some evidence to support, will not be sustained. *Gilbo & Swartz v. Merrill's Est.*, 380.
- In reviewing denial of defendant's motion for a directed verdict, the evidence must be reviewed in the light most favorable for plaintiff. *Raymond v. Sheldon's Est.*, 396; *Bigelow, Admr. v. St. Johnsbury*, 423; *Fitzgerald Bros Brewing Co. v. Kelley's Est.*, 471.
- Finding of trial court that a witness is qualified to testify as to a fair and reasonable price for services of a certain nature is not re-

visible, there being some evidence of qualification. *Raymond v. Sheldon's Est.*, 396.

An exception to an unanswered question is not available. *Ibid.*

(B) Presumptions.

It will not be presumed that chancellor made an improper use of a fact found in making his ultimate findings. *Waterman v. Moody*, 218.

In construing the record to determine whether certain evidence was received under exception, all intendments are against the exceptor. *Ibid.*

On reviewing motion for directed verdict, Court will take as established all that plaintiff's evidence fairly and reasonably tended to show. *Johnson v. Doubleday*, 267.

In reviewing an appeal from assessment of injunction damages, every intendment will be made in favor of the decree. *Hawley v. Chaffee*, 317.

In passing upon the admissibility of the testimony of a witness given at a former trial between the same parties, in the absence of a showing to the contrary, it will be assumed that the rules governing the admissibility of such testimony have been followed by the court. *In re Martin's Est.*, 362.

The finding of the trial court that a witness, whose testimony at a former trial between the same parties was offered in evidence, was unable to attend court or give a deposition, will be assumed to mean that he was physically unable to do so. *Ibid.*

Where the testimony is not before the Supreme Court, and from the record it cannot be said that certain testimony could not be admissible in any state of the evidence, an exception thereto will not be sustained, all intendments being in favor of the ruling. *Ibid.*

Where the record does not show that a proper foundation for the admission of certain testimony was not laid on trial, the Supreme Court will assume that it was laid. *Ibid.*

When record shows that a question was answered before objection was made, it will not be presumed that the answer was given before objection could have been made. *Ford v. Hersey*, 405.

(C) Discretion of Lower Court.

Decision of matter in court's discretion will not be disturbed unless it appears there was an abuse of the discretion. *Bundy v. Shelton Swallow Co.*, 193.

Question of remoteness of offered evidence is ordinarily addressed to discretion of trial court, but it is a judicial discretion, and must be exercised in such a way as to make the result harmonize with the true spirit of the law. *Johnson v. Doubleday*, 267.

Evidence that penstock at defendant's mill was leaking a year previous to plaintiff's accident was properly excluded by the court, in its discretion, as being too remote. *Ibid.*

Motion to set aside verdict is addressed to discretion of the court, and when it does not appear that the discretion was withheld or abused, the ruling will not be revised. *Johnson v. Doubleday*, 267. *McDonald v. McNeil*, 356; *Raymond v. Sheldon's Est.*, 396.

Court will not reverse the order of a chancellor denying a motion to file a cross bill, unless it is a clear case of an abuse of discretion. *Ford v. Hersey*, 405.

When evidence, if believed, entitled the plaintiff to a certified execution, action of trial court in granting the same cannot be revised. *Larrow v. Martell*, 435.

Where the admission of evidence is within trial court's discretion, the exclusion of such evidence, it not appearing otherwise, will be considered as made in the trial court's discretion. *In re Barron's Est.*, 460.

(D) **Harmless Error.**

The erroneous admission or exclusion of evidence, which has already been received without objection, is harmless error. *Baldwin v. Gaines*, 61.

To receive evidence that a certain thing should have been done under certain circumstances, it being obvious from the testimony that the same thing should have been done, is harmless error. *Ibid.*

Witness' reply that he knew nothing about the matter inquired about renders the answer harmless. *Russ v. Good*, 202.

Where no prejudicial error in argument of counsel appears, exception thereto will not be sustained. *Ibid.*

Exception to testimony which cannot possibly have prejudiced excepting party is without merit. *Waterman v. Moody*, 218.

Party is not prejudiced by finding which can be rejected without disturbing decree against him. *Ibid.*

Argument of plaintiff's counsel unwarranted, but, under the circumstances, harmless. *Haglin-Stahr Co. v. M. & W. R. R. R.*, 258.

A question asked but not answered cannot result in prejudice to the exceptant. *Ford v. Hersey*, 405.

Where object was to show the different amounts and the sum total of money paid by a person during a certain period, exclusion of evidence of wages received by him from his different employees during such period was harmless. *Ibid.*

In case where defendants were charged with a conspiracy to defraud plaintiff, limiting certain of his evidence to one defendant was harmless error, where similar evidence had already been received without objection or limitation, and the jury found in favor of the other defendants on the claim of conspiracy. *Arnold v. Somers*, 512.

It was harmless to exclude a question asked in cross-examination as to witness' knowledge of a certain fact, when, in further cross-examination, it inferentially appeared that he had no knowledge of such fact. *Ibid.*

The admission of evidence on cross-examination of a corporation's president, objected to as immaterial, as to a certain corporation record, was harmless because the record was later admitted without objection. *Ibid.*

§ 6. Determination and Disposition of Cause.

Where report of referee furnishes necessary basis for adjustment of entire controversy, final judgment will be rendered in Supreme Court. *Globe Granite Co. v. Clements*, 383.

Where it appears that the case was disposed of on the chancellor's findings, the reference in a decree to a demurrer is treated as surplusage, and the case ordered to stand for hearing on its merits. *Davis v. Union Meeting House Society*, 402.

Decree modified to conform with equitable principle that he who seeks equity must do equity. *Ford v. Hersey*, 405.

ASSAULT AND BATTERY.

See "WITNESSES" § 2.

In a civil action, a plea of guilty to a criminal complaint for the same assault is to be given such weight, as evidence, as the circumstances under which it was entered warrant. *Russ v. Good*, 202.

Court did not abuse its discretion in permitting cross-examination of defendant upon his explanation of plea of guilty entered by him to criminal complaint. *Ibid.*

Charge of the court upon subject of self-defence was not misleading. *Ibid.*

No error in charge of court upon subject of a plea of guilty entered by defendant to criminal complaint for same assault. *Ibid.*

ASSAULT WITH INTENT TO KILL.

See "HOMICIDE."

ASSUMPSIT, ACTION OF.

See "CONTRACT, ACTION OF."

ATTACHMENT.

See "EVIDENCE" § 8 (A).

§ 1. Property Subject to Attachment.

A conditional vendee has no attachable interest in property on which the vendor's lien is more than it is worth. *Humphrey v. Wheeler*, 47.

§ 2. Return.

The officer's return must describe the property attached with reasonable certainty. *Humphrey v. Wheeler*, 47.

The attachment of a less number of cows and articles of personal property than the defendant owned, the return not showing the particular ones attached, creates no lien thereon. *Ibid.*

A return of the attachment of one spike tooth harrow located in the town of Glover, with no further description or location given, creates no attachment lien thereon, in the absence of showing that debtor had only the one harrow in town named. *Ibid.*

ATTORNEY AND CLIENT.

See "TOWNS."

AUTOMOBILES.

See "HIGHWAYS."

BILLS AND NOTES.

See "EVIDENCE" §§ 5, 9, 10; "MORTGAGES"; "PRINCIPAL AND AGENT"; "PRINCIPAL AND SURETY."

§ 1. Generally.

Partial failure of consideration of a promissory note between the original parties is not a defence *pro tanto* against a subsequent holder for value and before maturity. *City Savings & Trust Co. v. Peck*, 310.

§ 2. Negotiable Instrument Act.

The term "material particular" used in Sec. 14, No. 99, Acts 1912 (G. L. 2884), includes any particular proper to be inserted in the instrument. *Howard National Bank v. Arbuckle*, 86.

Under the Act, bank cashier has *prima facie* authority to fill a blank in a note payable to the bank, by inserting the time for which the note is to run. *Ibid.*

In such case, his act does not release indorser on note. *Ibid.*

Indorsee of note, negotiated while current, who has paid full value for the same, is, under the Act (G. L. 2928), *prima facie* deemed to be a holder in due course, and is presumed to be a *bona fide* holder. *City Savings & Trust Co. v. Peck*, 310.

BILL OF LADING.

See "CARRIERS."

BOOK ACCOUNT.

Form for declaration in book account provided by G. L. 7472 conforms to requirements of Practice Act. *N. Y. C. R. R. Co. v. Clark*, 375.

In action of book account to recover freight charges, pleas that plaintiff falsely represented what the proper charges were, that there was nothing due plaintiff, and no account between them, are bad because they go to the specification and not to the declaration, and do not relieve defendant from liability to account. *Ibid.*

Defendant in action of book account cannot file an answer or plea in bar that goes to the merits of the accounting, or that, if true, depends upon the state of the accounting claimed, and is not entitled to a jury trial on the issue raised thereby. *Ibid.*

CARRIERS.

See "TRIALS" § 4.

Railroad company is responsible for damages caused by act of God, which might have been avoided by human prudence and care. *Porter Screen Mfg. Co. v. C. V. Ry. Co.*, 1.

Rights of shipper and carrier as to interstate shipments depend wholly upon the Federal statutes, the bills of lading, and the common law as accepted and applied in the Federal Courts. *Haglin-Stahr Co. v. M. & W. R. R. R.*, 258.

Prima facie, common carrier, by accepting goods for transportation, incurs the common law responsibilities as modified by statute; and any one asserting the contrary assumes the burden of proving it. *Ibid.*

Common carrier is liable for loss or damage to goods in its custody unless caused by act of God, public enemies, fault of shipper, acts of competent authority, inherent nature of the property, or some cause against which it has lawfully contracted. *Ibid.*

Upon showing that goods were delivered to carrier in good condition and arrived in bad condition, carrier is conclusively presumed to be at fault, unless he shows that the damage resulted from excepted cause. *Ibid.*

Under Carmack Amendment liability of initial carrier for loss or damage to an interstate shipment is same as at common law. *Ibid.*

Provision in bill of lading for filing written claim for damage to shipment within four months after delivery is binding upon shipper, when reasonable, and not waived. *Ibid.*

In action to recover for injuries to a shipment, plaintiff is entitled to recover as damages a sum equal to simple interest from time of arrival of the goods, and not merely from time of filing written claim for damage as required by bill of lading. *Ibid.*

Provision in bill of lading that property received from or delivered on private or other sidings, wharves or landings shall be at owner's risk until cars are attached to and after they are detached from trains, is reasonable and not inconsistent with public policy. *Bianchi & Sons v. Montpelier & W. R. R. R.*, 319.

By accepting bill of lading shipper is presumed to agree to be bound by such provisions therein as are reasonable and not inconsistent with public policy. *Ibid.*

When car is delivered by railroad company on a private siding, designated in bill of lading, and consignees given a reasonable opportunity to examine the shipment and take it away, responsibility of carrier, as such, ceases. *Ibid.*

Terminal carrier has right to presume that consignees still hold bill of lading and are the owners of the property described therein, until notified to the contrary. *Ibid.*

Carrier is not bound to give notice to consignees of arrival of shipment at destination in order to relieve it, as such, from liability. *Ibid.*

In relation of warehouseman carrier is bound only to use ordinary care and diligence in keeping the goods safely. *Ibid.*

In action against carrier, burden of proof upon question whether it failed to use ordinary care and diligence in its relation as warehouseman is upon plaintiff. *Ibid.*

Terminal carrier may properly, as warehouseman, allow a granite monument to remain in the car, on a private siding designated in bill of lading as place of delivery, instead of putting it in a storehouse. *Ibid.*

CASES (SPECIALLY APPROVED, CRITICISED OR DISTINGUISHED).

Carpenter v. Hollister, 13 Vt. 553. (Distinguished) *Waterman v. Moody*, 218.

Church v. Chapin, 35 Vt. 223. (Approved) *Ludlow Savings Bank & Trust Co. v. Knight*, 171.

Clark's Admr. v. Wilmington Sav. Bank, 89 Vt. 6. (Distinguished) *Vermont Fruit Co. v. Wilson*, 112.

Mann v. Fairlee, 44 Vt. 672. (Distinguished) *Vermont Box Co. v. Hanks*, 92.

Raymond v. Roberts, 2 Aik. 204. (Disregarded) *Drown v. Chesley's Est.*, 19.

Sessions v. Gilbert, Brayton 75. (Disregarded) *Drown v. Chesley's Est.*, 19.

Smith v. Wiley, 41 Vt. 19. (Approved) *Ludlow Savings Bank & Trust Co. v. Knight*, 171.

State v. Bisbee, 75 Vt. 293. (Disregarded) *State v. Eaton*, 290.

State v. Searle, 56 Vt. 516. (Disregarded) *State v. Eaton*, 290.

Whitney v. Sears, 16 Vt. 587. (Distinguished) *Vermont Fruit Co. v. Wilson*, 112.

Wiley v. B. & M. R. R., 72 Vt. 120. (Overruled) *Aiken v. Metcalf*, 57.

CERTIFIED EXECUTION.

See "APPEAL AND ERROR" § 5 (C).

CHARGE OF THE COURT.

See "APPEAL AND ERROR" § 5 (A); "CHATTEL MORTGAGES"; "CRIMINAL LAW" §§ 4, 6; "TRIAL" § 6.

CHATTEL MORTGAGES.

Statement of location of mortgaged property not indispensable to sufficient description. *Wells v. Blodgett*, 330.

In testing sufficiency of description covering "one red and white cow, four years old," it will not be assumed that mortgagor had more than one cow of that kind; that being a matter of defence in impeaching the mortgage. *Ibid.*

Request for binding instruction that a description in a chattel mortgage is insufficient is properly refused unless it can be said as a matter of law. *Ibid.*

The rule that the description of animals by sex, age, and color is sufficient to give the description *prima facie* validity, is subordinate to the rule that, to be sufficient against third persons having constructive notice only, the description must be such that the property can be identified by reference to the instrument itself, aided by such inquiries as may be indicated thereby. *Ibid.*; *Wright v. Lindsay*, 335.

In passing upon request for binding instruction that the description of a cow was insufficient, it will be assumed that the cow in question was truly described. *Wells v. Blodgett*, 330.

Description of a red and white cow, four years old, included among twelve cows mortgaged, was *prima facie* sufficient to charge purchaser of the cow from the mortgagor with notice of the mortgage. *Ibid.*

In action of trover for a cow by mortgagee against purchaser from mortgagor, where evidence tended to show that two of the mortgages relied on by plaintiff were executed after the mortgagor sold the cow, it was error to refuse to charge that plaintiff could not recover by virtue of any mortgage executed after defendant had purchased and taken possession of the cow. *Ibid.*

In such case, where the cow sued for was described in the mortgage as a red and white cow four years old, included among twelve cows mortgaged, it was error to submit the case to the jury on theory that the determining issue was the identity of the cow, but court should have charged that whether or not the mortgage was binding on the defendant depended upon the accuracy of the description, and that if the color of the cow was as described in the mortgage, the description was sufficient. *Ibid.*

Designation of an automobile in a chattel mortgage by its engine number, which would not ordinarily be employed for purpose of identification, is not alone enough to nullify the notice that the mortgage

would impart to third persons, for its parts must be construed together so that every part may be effectual. *Wright v. Lindsay*, 335.

Description of a Ford touring automobile, of a certain model and number, purchased by the mortgagor from the mortgagee on a certain day, then in the possession of the mortgagor, and being the only automobile that he then owned, is *prima facie* valid against a vendee of the mortgagor. *Ibid.*

CONSTITUTIONAL LAW.

See "CRIMINAL LAW" § 1; "FISH AND GAME"; "INDICTMENT AND INFORMATION" § 1; "INTOXICATING LIQUORS."

The provisions of the Fifth Amendment of the Federal Constitution, wherein double jeopardy is prohibited, are not intended to limit the powers of the state governments in respect to their own people, but merely operate as restrictions upon Federal action. *State v. Felch*, 477.

The "due process of law" referred to in the Fourteenth Amendment of the Federal Constitution, is due process according to the Constitution and laws of the particular state involved. *Ibid.*

G. L. 2598, giving the State a right of exception in criminal cases, is not in violation of the Fourteenth Amendment of the Federal Constitution. *Ibid.*

G. L. 2598 is not in violation of our Bill of Rights, Art. 10. *Ibid.*

Due process of law, which is the law of the land, is not immutable, but changes from time to time, and is a matter of legislation, provided that express constitutional provisions and the fundamental rights of life, liberty and property are not infringed or impaired. *Ibid.*

CONTRACTS.

See "EQUITY"; "EVIDENCE" §§ 4, 9; "RECEIPTS"; "SALES."

§ 1.- Requisites, Validity, Construction and Operation.

There is no implied promise to pay for ordinary services performed by one, who, after coming of age, continues as a member of the family of one who stood in *loco parentis* to him. *Drown v. Chesley's Est.*, 19.

In such a case, if payment is claimed, it must be shown that the services were performed and received with that expectation. *Ibid.*

Where defendant conveyed to plaintiff land which he had previously conveyed to plaintiff's father and which had been decreed to plaintiff on his father's death, but of which plaintiff was ignorant, and plaintiff believed the defendant owned the land, as the latter knew, the law implies a promise by the defendant to repay the purchase price to the plaintiff. *Holt v. Ruleau*, 74.

In such a case, no demand is necessary before bringing suit. *Ibid.*

Guaranty of efficiency in contract for installation of a windmill and water system according to certain specifications, is no more than a guaranty of such efficiency as the work properly carried out in accordance with the specifications would afford. *Gilbo & Swartz v. Merrill's Est.*, 380.

Where a third person made an original contract to pay plaintiff hospital the expense of the treatment and care of the defendant, there is no promise implied in law by the defendant to pay such expense. *Brightlook Hospital Ass'n v. Garfield*, 353.

That a contract to manufacture is by way of an undertaking to comply with a written order is immaterial on question whether it contains an express warranty. *Globe Granite Co. v. Clements*, 383.

Where a contract is evidenced by a written instrument, the question whether it embodies an express warranty is one of construction for the court. *Ibid.*

An implied contract to pay for services rendered must contain all the elements of an express contract, and differs from the latter only in its proof, each depending upon questions of fact. *Raymond v. Sheldon's Est.*, 396.

§ 2. Performance or Breach.

Where no time is set for the performance of an agreement of compromise, a reasonable time is allowed by law. *B. & M. R. R. v. Union Mutual Fire Ins. Co.*, 137.

Breach of stipulation in contract of sale of merchandise that vendor would not sell like merchandise to any of vendee's competitors, will not justify vendee in refusing to pay contract price. *Ticknor Bros. v. Evans*, 278.

Where one party has derived substantial benefit from a contract partly performed by the other party, he cannot refuse to comply with its terms, simply because the latter fails of complete performance. *Ibid.*

§ 3. Recission and Abandonment.

Suit brought upon original liability after an agreement of settlement has been made, is notice of the attempted recission of the agreement, and dispenses with the necessity of tendering sum due under the agreement. *B. & M. R. R. v. Union Mutual Fire Ins. Co.*, 137.

§ 4. Actions for Breach.

In action to recover upon an implied contract to pay for services, if there is any substantial evidence fairly and reasonably tending to establish such contract, the question is for the jury. *Raymond v. Sheldon's Est.*, 396.

Where plaintiff's evidence tended to show that she performed valuable services for the deceased at the latter's request, question of whether there was an implied promise on the part of deceased to pay plaintiff what her services were reasonably worth, was for the jury. *Ibid.*

CONTRACT, ACTION OF.

Money in one's hands belonging to another, which he has no right conscientiously to retain, can be recovered under the common counts. *Holt v. Ruleau*, 74.

COMMON COUNTS.

See "CONTRACT, ACTION OF."

CORPORATIONS.

See "EVIDENCE" § 6; "PRINCIPAL AND AGENT."

§ 1. Foreign Corporations.

Foreign corporations may be permitted to do business in this State under such conditions and regulations as the State may impose, not thereby affecting matters of a Federal nature. *Fidelity & Deposit Co. v. Brown*, 390.

Under G. L. 5623, when another state or country imposes upon a domestic insurance company doing business therein fees, etc., exceeding those imposed by this State upon foreign insurance companies doing business herein, this State can impose corresponding fees, etc., only upon foreign insurance companies doing business herein, of the same classification. *Ibid.*

COURTS.

See "PRACTICE ACT."

Prior to G. L. 2301, city or municipal courts had no jurisdiction of appeals from justice courts under P. S. 2033. *New York Moline Plow Co. v. Maeck*, 17.

Court will dismiss a cause at any stage when it is discovered that it has no jurisdiction. *Miner's Exrx. v. Shanasy*, 110.

An objection to the jurisdiction is never out of time. *Ibid*.

COURT RULES.

Exceptions to charge not briefed as required by Supreme Court Rule 6, par. 5, will not be considered. *Vermont Box Co. v. Hanks*, 92.

Exception not noted by court at time of making decision is unavailing, under County Court Rule 31. *Bundy v. Shelton Swallow Co.*, 193.

Chancery Rule 15. *Waterman v. Moody*, 218.

CRIMINAL CONVERSATION.

See "HUSBAND AND WIFE."

CRIMINAL LAW.

See "ABORTION"; "ADULTERY"; "CONSTITUTIONAL LAW"; "FISH AND GAME"; "HOMICIDE"; "INDICTMENT AND INFORMATION"; "INTOXICATING LIQUOR."

§ 1. Generally.

Where an offence is a necessary element in and constitutes a part of another, an acquittal or conviction of one is a bar to a prosecution for the other. *State v. Albano*, 51.

Language of Chapter 1, Art. 10, of Vermont Constitution, that "in all prosecutions for criminal offences a person hath a right to demand the cause and nature of his accusation" does not mean that the accused must make actual demand for the information, but only that he is entitled to be informed of the nature of the charge against him. *State v. Villa*, 121.

Under the Constitution of Vermont, the first jeopardy of a respondent in a criminal case continues until a result free from error is attained. *State v. Felch*, 477.

§ 2. Evidence.

Evidence that respondent was a steady worker has no tendency to contradict evidence that he occasionally drank intoxicating liquor. *State v. Albano*, 51.

Presumption of innocence is to be given such weight as the jury think it ought to have. *State v. Rossi*, 187.

Declaration of a detective employed by State, but not called to testify, that if he could not get liquor at respondent's house, they should go to another place, was properly excluded. *State v. Ceresa*, 190.

Evidence that a detective employed by the State, but not called to testify, was illegally selling intoxicating liquor to the witnesses who testified against the respondent, was properly excluded. *Ibid.*

Where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, he is allowed, to a certain extent, to give his conclusion, judgment or opinion. *State v. Felch*, 477.

In the prosecution of a woman for the murder of her husband, acting in concert with her lover, it was error, as to the State, to exclude the testimony of a witness who saw the respondent and her lover at a social gathering, concerning the expression of her face and eyes when she looked at her lover. *Ibid.*

§ 3. Trial.

Improper remarks of counsel to jury are harmless when ruled out by the court and unreservedly withdrawn by counsel. *State v. Bolton*, 157.

Request by State's Attorney that respondent produce a printed card, which is promptly withdrawn, is not error. *Ibid.*

Within court's discretion to exclude question to State's witness by cross-examiner whether he had stated that he had a right to be, and had been, engaged in the selling of intoxicating liquor. *State v. Rossi*, 187.

Where there was evidence upon which the jury could find the respondent guilty, although the evidence as to who committed the crime was conflicting and circumstantial, a motion by the respondent for a directed verdict was properly overruled. *State v. Warm*, 447.

In order to justify an exception by the State in a criminal case, it must be authorized by an express and valid statute. *State v. Felch*, 477.

G. L. 2598 gives a right of exception to the State in a criminal case equal in all respects to that possessed by the respondent. *Ibid.*

It was reversible error for respondent's counsel to deliberately persist in offering certain evidence after the court had excluded similar evidence. *Ibid.*

Where respondent had given three statements which had been taken by a stenographer, two of them at statutory inquests, argument by her counsel that she had been "pounded and pummeled" by the State at the various inquests was not reversible error; counsel explaining, on objection, that he only used the words figuratively, and the offensive terms having been sufficiently withdrawn. *Ibid.*

It was proper for respondent's counsel to argue that she had testified knowing that she would be confronted by her testimony taken stenographically elsewhere. *Ibid.*

Where the State took exceptions, and there was a verdict of acquittal, the court properly refused to render judgment on the verdict. *Ibid.*

§ 4. Instructions to Jury.

Not error to charge as requested, there being no evidence warranting the instructions requested. *State v. Albano*, 51.

Charge did not infringe constitutional provision that person cannot be compelled to give evidence against himself, nor statutory provision that respondent's refusal to testify shall not be considered against him. *State v. Bolton*, 157.

Unnecessary for court to remind jury that it is their duty to respect their oath. *Ibid.*

In case where respondent did not testify, a request that "the respondent is to be treated as though his mouth was closed by law," was properly refused. *Ibid.*

Charge limiting impeaching effect of certain evidence was proper. *Ibid.*

In prosecution for performing abortion, charge that jury should consider the testimony of various witnesses in determining whether operation was necessary to save life, was proper. *Ibid.*

Not error for court to refuse to comply with a request based upon mistaken view of the evidence. *Ibid.*

Instruction that the presumption of respondent's innocence is a piece of evidence to be considered and weighed by the jury with other evidence is all respondent is entitled to. *State v. Rossi*, 187.

Instruction that respondent's *refusal to testify* should not be taken against him, with explanation that respondent might testify or not

as he chose, and that if he did not testify, the fact must not be taken against him, is errorless. *Ibid.*

Exception will not lie to the failure of the court to comply in terms with requests to charge, where, in its own way, it charged substantially in accordance with the requests. *State v. Warm*, 447.

§ 5. Motions for New Trial and in Arrest.

(A) New Trial.

New trial will be granted respondent convicted of murder in the first degree where it appeared that a juror who served at the trial, went, soon after the homicide, to the place where the dead body was found, assisted in removing it, and had opportunity to observe various facts which were matters of issue on trial. *In re Ketchum*, 280.

As a general rule, new trial will not be granted on ground of newly discovered evidence which only tends to discredit or impeach an opposing witness, especially if it is denied by such witness; but the rule is subject to exception and is in the control of the Court. *State v. Brittell*, 293.

In a petition for new trial after conviction of adultery, where the supporting affidavit of respondent's minor daughter that a portion of her testimony given on trial against respondent was false, was retracted by her subsequent affidavit, and her testimony given at the trial was corroborated by that of other witnesses and by circumstances in the case, the petition should be dismissed. *Ibid.*

On petition for new trial on the ground of the disqualification of a juror, where it is found that before the trial a juror who sat on the case wagered the cigars that the respondent would be convicted, a new trial will be granted without inquiring whether the result of the trial was affected thereby. *State v. Warm*, 447.

In such case, the amount of the wager is immaterial, the only question at stake being the due administration of justice. *Ibid.*

(B) Motion in Arrest.

As against motion in arrest, argumentative allegations in an information are sufficient. *State v. Eaton*, 290.

As against motion in arrest, an information is aided by a verdict of guilty as to all facts implied from those expressly alleged, which it was necessary for State to prove. *Ibid.*

§ 6. Appeal and Error.

An exception not sufficiently explicit to raise question relied upon will not be considered. *State v. Mack*, 103.

Exception to failure of court to charge that respondent could not be convicted, in a prosecution under No. 201, Act 1912, sec. 57, because the lands in question were not enclosed or cultivated, is not sufficiently explicit to raise question whether land "through which" the stream flowed was cultivated. *Ibid.*

Constitutional question, not raised upon trial, will not be considered. *Ibid.*

In considering exception to charge to jury, Court will consider together all that court said. *State v. Bolton*, 157.

Question of the admissibility of evidence, not excepted to below is not before Supreme Court. *State v. Rossi*, 187.

Reception of evidence bearing upon a certain issue was not made reversible error by the fact that the State failed to make out such a case upon that issue as justified the court in submitting the question to the jury. *State v. Avicelli*, 287.

No error can be imputed to argument of counsel based upon evidence properly received. *Ibid.*

An exception will not lie to remarks made in argument by counsel for the State where prejudicial error is not shown by the bill of exceptions. *State v. Warm*, 447.

Where no possible harm could have been done to the State by allowing an improper question to a witness on cross-examination, an exception thereto will not be sustained. *State v. Felch*, 477.

Where a certain ruling is in court's discretion, and the record does not show that the court did not rule on the question as matter of discretion, it will be taken that it did. *Ibid.*

Exceptions not briefed are waived; and the Court will not, to reverse a case, search the record for defects or errors not called to their attention by the respondent. *State v. Kaatz*, 497.

When it does not appear that the trial court abused its discretion in refusing to send the case to Supreme Court before final trial, on overruling a respondent's demurrer to a complaint, its action is not reviewable. *Ibid.*

When a respondent's demurrer to a complaint has been overruled, he can be heard on the same in Supreme Court as well after as before trial in the court below. *Ibid.*

CROSS BILL.

See "EQUITY" § 2.

DAMAGES.

See "APPEAL AND ERROR" § 5 (A); "CARRIERS"; "FRAUD" § 2;
"INSURANCE"; "TRIAL" § 6.

Damages caused by act of God. *Porter Screen Mfg. Co. v. C. V. Ry. Co.*, 1.

While loss of earning capacity is a proper element of damage, and is ordinarily shown by proof of what plaintiff earned before the injury and what he has earned since, enough facts must be shown to enable the jury to make an intelligent determination of the extent of his loss. *Baldwin v. Gaines*, 61.

Facts in this case, not sufficient basis for submitting loss of earning capacity to the jury. *Ibid.*

DEPOSITIONS.

See "PARTIES."

Departure from the strict letter of the statute in minor and formal matters may be disregarded, if no injustice will result in the admission of a deposition in evidence. *Vermont Fruit Co. v. Wilson*, 112.

If a deposition purports to have been taken by competent authority, the authority of the person who acted will be presumed until the contrary appears. *Ibid.*

Where a legal cause, according to the fact, is assigned in the citation for taking a deposition, it is no objection that the real cause is not stated. *Ibid.*

Deposition taken under agreement indicating that it should be used by either party, may be introduced in evidence by either party. *Haglin-Stahr Co. v. M. & W. R. R. R.*, 258.

DISCRETION.

See "APPEAL AND ERROR" § 5 (C); "CRIMINAL LAW" §§ 3, 6; "EVIDENCE" § 10; "TRIAL" § 2; "WILLS" § 2; "WITNESSES" § 2.

DISMISSAL AND NONSUIT.

A court will dismiss a cause at any stage, whether moved by the party or not, when it is discovered that it has no jurisdiction. *Miner's Exrx. v. Shanasy*, 110.

DIVORCE.

See "JUDGMENT."

To entitle a wife to a divorce for gross or wanton and cruel failure to support, under G. L. 3560, in addition to showing desertion, though wilful, or neglect or refusal to support, she must establish some circumstance of indignity or aggravation characterizing the husband's conduct. *Whitaker v. Whitaker*, 301.

In an action for divorce on the ground of gross and wanton and cruel failure to support, in which the petition was dismissed, although the court's finding did not expressly state whether defendant's conduct was gross or wanton or cruel, and although it would ordinarily be assumed in support of the judgment that the court inferred that his conduct was not of that character, under the circumstances, as disclosed by the findings, the Supreme Court, in the exercise of its discretion, remanded the case for rehearing. *Ibid.*

Not error for trial court to decree minor child to mother, against whom a decree of divorce has been granted, when the father, on trial, attempted to invalidate the marriage, and so render the child illegitimate. *Deyette v. Deyette*, 305.

Facts held sufficient, as circumstantial evidence, to support a finding of adultery. *Walker v. Walker*, 443.

In a wife's suit for divorce on the ground of refusal to support, wherein her husband filed a cross petition on the ground of adultery, it was not an abuse of discretion, for the court, near the close of all the evidence, to refuse to allow her to amend her petition by setting up intolerable severity as a ground for divorce. *Ibid.*

In such a suit, wife can defend against husband's petition by way of recrimination, without amending the pleadings. *Ibid.*

Adultery by a wife, without condonation, is a bar to her obtaining a divorce on any ground. *Ibid.*

DOGS.

See "ANIMALS."

DOMICILE.

To constitute domicile, actual residence and intent to make that place home of party must concur. *Glover v. Greensboro*, 34.

To effect a change of domicile, there must be an actual change of residence, without the intention of going back. *Ibid.*

DUE PROCESS OF LAW.

See "CONSTITUTIONAL LAW."

ELECTRICITY.

See "NEGLIGENCE" § 2.

Where plaintiff's intestate was found dead under circumstances warranting the inference that he was electrocuted when he turned on an electric light furnished for his use by defendant, the insulation of the cord of which was worn off, the maxim *res ipsa loquitur* applied, and a *prima facie* case of negligence was made out. *Spinney's Exrx. v. Hooker*, 146.

EQUITY.

See "APPEAL AND ERROR" §§ 1, 2, 5 (A) (B), 6.

§ 1. Jurisdiction, Principles and Maxims.

To make equitable defence of laches available, it must appear that defendant has been injured by the delay complained of. *Holt v. Ruleau*, 74.

Court of chancery has no jurisdiction to transfer to itself suit at law over which county court has acquired jurisdiction. *Miner's Exrx. v. Shanasy*, 110.

Fair agreements for settlement of disputed claims are favorably regarded and will be upheld if possible. *B. & M. R. R. v. Union Mutual Fire Ins. Co.*, 137.

Delay in the performance of an agreement of compromise will not prevent a decree for specific performance of same where the payment of money is the only thing involved and it will not be inequitable to defendant, although original conditions cannot be restored. *Ibid.*

Plaintiff, on facts, can maintain suit to enjoin suit at law and compel enforcement of agreement to settle subject matter. *Ibid.*

Where no executor has been appointed under a will, court of chancery cannot entertain suit by remainderman to protect his interest in estate from waste. *Wheeler's Guardian v. Wheeler*, 167.

§ 2. Pleading, Practice and Procedure.

In a bill for the specific performance of an agreement, which the defendant has attempted to rescind, it is sufficient to aver a readiness and willingness to perform in compliance with the agreement and

- an offer to do so. *B. & M. R. R. v. Union Mutual Fire Ins. Co.*, 137.
- Bill by legatee under will to protect his rights in the estate, which fails to allege refusal or neglect of executor to act, will be dismissed. *Wheeler's Guardian v. Wheeler*, 167.
- Within discretion of court to entertain demurrer in amended answer, not contained in original answer. *Ibid.*
- Cross bill seeking specific performance of a contract, enforcement of a trust, and construction of a will, is multifarious and bad on demurrer. *Ibid.*
- If a defendant answers a part of the bill and then demurs to the same, the answer will overrule the demurrer. *Waterman v. Moody*, 218.
- Where the allegations in a bill are sufficient to afford a presumption of a conveyance, as well as to show title by adverse possession, it is not demurrable on ground that plaintiff acquired no right, by reason of certain improvements made, to deny defendant's title. *Ibid.*
- Where an amended cross bill has been filed, plaintiff can seek affirmative relief, concerning matters therein alleged, by a supplemental bill in the nature of a cross bill. *Ibid.*
- Where plaintiff alleges ownership of land without setting out by what title, there is no departure in alleging in a supplemental bill his title with particularity and consistently with earlier allegation of ownership. *Ibid.*
- Where chancellor sits as trier of facts it is discretionary when and how far he will report subordinate facts upon which he rests his ultimate findings. *Ibid.*
- When exception is taken to chancellor's findings which necessitates examination of the evidence in the Supreme Court, it is duty of chancellor, upon written request, to send up such portions thereof as are necessary. *Ibid.*
- A demurrer must be brought on for hearing before trial is had on the merits, or it will be held to have been waived. *Davis v. Union Meeting House Society*, 402.
- To avail himself on review of demurrer which has been heard and overruled, demurrant should ask for an order reserving the benefit thereof until final hearing. *Ibid.*
- Where, after full hearing on the merits, the chancellor sustained a demurrer and dismissed the bill, but the record failed to show any action taken on the demurrer prior to the hearing on the merits, the demurrer was waived, and was not before the chancellor for decision. *Ibid.*

ESTOPPEL.

See "TOWNS."

EVIDENCE.

See "ADVERSE POSSESSION"; "APPEAL AND ERROR" § 5 (A) (D); "CRIMINAL LAW" § 2; "HOMICIDE"; "HUSBAND AND WIFE"; "TENANCY IN COMMON"; "TRIALS" § 2; "WILLS" § 2; "WITNESSES."

§ 1. Judicial Notice.

The judgment and proceedings in another case than that on trial, even between the same parties, will not, as a rule, be taken notice of by the court of its own motion. *Hutchins v. George*, 371.

Former judicial proceedings between the same parties in the same court prove themselves when offered in evidence, since a court takes judicial notice of the authenticity of its own records. *Ibid.*

A request that the court take notice of a former judgment between the same parties in the same court and the specifications upon which the judgment was based, is, in effect, an offer of the proceedings in evidence, and if relevant and seasonably made, they are properly before the court for consideration. *Ibid.*

§ 2. Presumptions.

A person put upon inquiry regarding a certain fact, is presumed to have full knowledge of the same. *Porter Screen Mfg. Co. v. C. V. Ry. Co.*, 1.

It will not be presumed that a freight car was defective because placed upon a track used as a repair track. *Ibid.*

§ 3. Burden of Proof.

By producing a receipt for plaintiff's claim, defendant is not relieved of the ultimate burden of establishing an accord and satisfaction. *Drown v. Chesley's Est.*, 19.

§ 4. Relevancy, Materiality and Competency.

Evidence of local weather forecaster sending out notice of approaching high water to third persons in the vicinity, it appearing that person sought to be charged usually sent to the forecaster for information, is inadmissible. *Porter Screen Mfg. Co. v. C. V. Ry. Co.*, 1.

Evidence that owner repaired trap door, as tending to show that he and not the tenant is in control of premises, is admissible. *Beaulac v. Robie*, 27.

Fact that freight agent knew of Railway rules providing that inflammable substances, including unslacked lime, should be loaded on freight cars in a certain manner, is material on question whether agent had knowledge that water entering car of unslacked lime was liable to fire the car. *Porter Screen Mfg. Co. v. C. V. Ry. Co.*, 1.

Evidence of a conversation is not admissible for the purpose of fixing a date, nothing said or done at the time referring to the date, and it being inadmissible on any other ground. *Phelps v. Utley*, 40.

In action of malpractice, evidence that two physicians, who assisted defendant in cases where he gave the same treatment as that given to plaintiff, approved thereof, is not admissible. *Baldwin v. Gaines*, 61.

The fact that expert witnesses entertained at some previous time similar views to those expressed by them in testifying is immaterial. *Ibid.*

In action for fraud in misrepresenting boundary of land sold, evidence that defendant's agent, when sent upon the land to show it to plaintiffs, understood and told plaintiffs that one boundary was a town line is admissible. *Vermont Box Co. v. Hanks*, 92.

In such case, evidence that after plaintiffs purchased they sent the same man to point out the land to prospective customers, and he told them where the line was as he had told plaintiffs, is admissible. *Ibid.*

Statement of an agent made in the performance of his agency cannot be proved by his subsequent statement upon the same subject matter when acting as the agent of another. *Ibid.*

Where defendant testified that he told plaintiffs that the land in question ran "to the pulp company line," it was not error to ask him what line of the pulp company he meant, to make his meaning clear. *Ibid.*

Testimony in chief by a bank treasurer is not rendered incompetent because in cross-examination he testified that his testimony was his recollection from data taken from the records of the bank. *Vermont Fruit Co. v. Wilson*, 112.

In action to recover borrowed money, on cross-examination of plaintiff, question whether he had ever loaned money to any one except defendant was inadmissible. *Farmer v. Williams*, 132.

- In such action, evidence that some time before the loan plaintiff told witness that defendant wanted to borrow the money from him was properly excluded. *Ibid.*
- In such action, wherein defendant claimed that the money was not loaned by plaintiff but by another person since deceased, evidence that he repaid the money to such person was admissible. *Ibid.*
- In such action, and under such claim of defendant, evidence that he was in funds at time of claimed payments was inadmissible. *Ibid.*
- In action to recover for death of person due to defective insulation of an electric light cord, it was error to allow witness to testify that he knew of no reason why deceased should regard it as dangerous to take hold of the cord. *Spinney's Admr. v. Hooker*, 146.
- In such case, evidence regarding precautions taken by defendant to prevent grounds was admissible. *Ibid.*
- In such case, evidence that defendant took no precautions to see that the insulation on the wires was well preserved was admissible. *Ibid.*
- In such case, testimony of wife of deceased that he knew nothing about electricity was inadmissible. *Ibid.*
- In such case, evidence that deceased had talked with witnesses about dangers of his employment, but made no mention of dangers from electricity, and also other evidence that he was ignorant of such hazards, was admissible. *Ibid.*
- In a suit against an estate wherein plaintiff sought to recover upon an implied contract by deceased to pay for her services, where a witness testified without objection that she had seen plaintiff go to the home of deceased, it was not error to allow the witness to say how frequently she had seen this occurrence. *Raymond v. Sheldon's Est.*, 396.
- In such case, it was not error to allow the witness, after testifying without objection that she had seen articles which deceased told her had been purchased for her by plaintiff, to say what those articles were. *Ibid.*
- In such case, it was not error to allow a witness to testify as to the nature of purchases made by plaintiff, delivered either to plaintiff or to deceased and charged to and paid for by deceased, and the frequency with which plaintiff came to the store. *Ibid.*
- Evidence that persons were seen near a gate has no tendency to show that they used it. *Dodge Bros. v. C. V. Ry. Co.*, 454.
- In an action on a priest's note, defended on the ground of forgery, and where no claim was made against the parish, evidence that he did

not report the note as an indebtedness of the parish was properly excluded. *In re Barron's Est.*, 460.

§ 5. Demonstrative Evidence.

Where the execution of a note by an intestate is denied, the signature to official reports in the handwriting of the intestate are admissible as standards of his signature. *In re Barron's Est.*, 460.

§ 6. Admissions.

Written report made by official of corporation concerning an accident to an employee is not admissible against corporation unless made by him while acting within the scope of his agency. *Spinney's Admrx. v. Hooker*, 146.

Testimony of manager of corporation that he made a report of an accident as a part of his duties as manager is not alone sufficient to establish the official character of the report. *Ibid.*

Statement of agent, to bind principal, must be one of fact, not of opinion. *Ibid.*

Statement of manager of corporation in his report of circumstances of death of employee that the insulation of an electric cord was "worn off" is not admissible against the corporation. *Ibid.*

Admissions of a predecessor in title, made while the title was by hypothesis still in him, are not governed by the hearsay rule, but are to be treated as primary evidence, and, on the ground of priority, stand as though made by the party opponent. *Waterman v. Moody*, 218.

Test of admissibility of an admission by a predecessor in title is whether it would have been admissible against him. *Ibid.*

§ 7. Declarations.

Declarations of deceased persons against their interest or right are admissible against those who claim in their interest or right. *In re Bugbee's Will*, 175.

Inventory of an estate made by administrators, one of whom was defendant's grantor, who inherited all the estate, wherein there is no mention of the land in question claimed to have been inherited by him, stands as a declaration against an existing interest made by him before conveying the land. *Waterman v. Moody*, 218.

Disserving declarations of former owner of real estate made before parting with title, are admissible against those claiming under

him on any issue relating to title, ownership, or possession which may be proved by parol. *Ibid.*

Declaration against title, made by one tenant by entirety in presence and hearing of the other, is admissible against such other and her privies in title. *Pope v. Hogan*, 250.

Admission of statements of husband or wife, in nature of declarations of a grantor or possessor of property, against each other, is controlled by general rules admitting similar declarations. *Ibid.*

Statements of joint owner of real estate not made in presence and hearing of the other owners are admissible against them if there is an identity of legal interest. *Ibid.*

Where husband and wife occupy real estate as tenants by entirety, admissions against title made by one, not in the presence and hearing of the other, are not admissible against the other. *Ibid.*

Not error to exclude evidence that after death of one, through whose alleged title by adverse possession defendants claimed title, his wife, who was one of the defendants, attempted to borrow money to pay the taxes, declaring that she owned the premises. *Ibid.*

Declarations of an agent were properly excluded, it not appearing when they were made nor that they were made while the agent was performing some act within the scope of his agency and with reference to the act which was being done. *In re Barron's Est.*, 460.

§ 8. Documentary Evidence.

(A) Public.

An attachment record, required to be made by P. S. 1456 (G. L. 1753) is a public record, and a duly certified copy is admissible in evidence. *Humphrey v. Wheeler*, 47.

Grand list books, showing to whom certain lands were listed for taxation, are admissible to prove who paid the taxes on them. *Waterman v. Moody*, 218.

(B) Private Writings and Publications.

Printed articles in public newspapers do not have effect of constructive notice of facts stated therein. *Porter Screen Mfg. Co. v. C. V. Ry. Co.*, 1.

Contents of medical books are not admissible as evidence of the facts therein stated, either directly or indirectly, or by having expert witness read the same in connection with his examination. *Baldwin v. Gaines*, 61.

Entries in books of any kind which are charges in book account are admissible in evidence as such, while entries which are memoranda merely are inadmissible. The manner and purpose of keeping the account, rather than the form of the books themselves, determine to which class the entries belong. *Stockwell v. Stockwell's Est.*, 489.

An entry "Nov. 23 Loaned T. E. Stockwell without security \$125.00," on a page headed "Memoranda" in the back part of a diary suitable, if not intended, for debit and credit items, and where other loans were so charged in the same book, was a charge in book account, and admissible in evidence. *Ibid.*

Entries appearing in a diary as part of the day there recorded, with nothing to indicate that they were intended for anything more, are not book charges, but memoranda, and are inadmissible. *Ibid.*

§ 9. Parol or Extrinsic Evidence Affecting Writing.

A receipt not under seal can be explained or contradicted by parol evidence. *Drown v. Chesley's Est.*, 19.

A receipt embodying a contract between the parties cannot be modified or contradicted by parol evidence. *Ibid.*

Evidence which goes only to the binding force of a written instrument is admissible. *In re Bugbee's Will*, 175.

Where a note on its face appears to be the personal undertaking of the party signing it, in a suit on the note against his estate it cannot be shown by parol evidence that he in fact signed it as agent for a third person, to the knowledge of the payee. *In re Barron's Est.*, 460.

§ 10. Opinion Evidence.

Where an expert bases his opinion on the authorities, or testifies as to what they show, the books may be read to contradict him. *Baldwin v. Gaines*, 61.

A physician can testify that a condition was caused by a certain method of treatment, although he had never used that method. *Ibid.*

In the examination of an expert, the same hypothesis may be made the basis of a question in cross-examination, as in direct. *Ibid.*

In action to recover for death of a person due to defective insulation of an electric cord, not error to allow expert electricians to testify to different ways in which a ground could be produced. *Spinney's Admrx. v. Hooker*, 146.

In such case, not error to allow expert electricians to testify that unless there was a ground a person would not be harmed by touching the bare wires. *Ibid.*

In such case, expert can testify that moving the electric lamp from place to place would cause the insulation on the cord to break away, it appearing that the cord when not in use was coiled up and hung on a peg. *Ibid.*

The law does not attempt to define amount of knowledge person must have to make him a competent witness as to value, except that he must be sufficiently acquainted with the subject matter to be able to form some estimate of its value. *Hefflon v. Cashman*, 323.

Whether witness has sufficient acquaintance with subject matter to make him competent to testify as to value is a preliminary question for trial court, and its ruling thereon will not be revised unless shown to be erroneous or founded on error of law. *Ibid.*

Upon question of value of property, any person who knows it and has an opinion of its value, is competent to testify. *Ibid.*

Question as to whether a witness has had an adequate opportunity of observation in circumstances calculated to result in an inference helpful to the jury, is largely one of administration and within the discretion of the trial court. *In re Martin's Est.*, 362.

The admission of an opinion of an expert witness based upon all the evidence in the case which includes the conflicting opinions of other witnesses is reversible error. *Ibid.*

One, who for several years saw letters purporting to be personally signed by the intestate, and, in business with the intestate, acted upon them as his letters, of which the latter must have known and acquiesced therein, is qualified to testify that in his opinion the signature to a note sued upon is in the handwriting of the intestate. *In re Barron's Est.*, 460.

§ 11. Evidence at Former Trial or in Other Proceeding.

Testimony of a witness given at a former trial between the same parties may be introduced if the witness has since died or become insane, is sick and unable to testify, is out of the jurisdiction, or has been kept away by the other party. *In re Martin's Est.*, 362.

§ 12. Weight and Sufficiency.

A receipt not under seal, written "in full settlement," is *prima facie* evidence of full payment and satisfaction. *Drown v. Chesley's Est.*, 19.

EXCEPTIONS, BILL OF.

See "APPEAL AND ERROR" § 2.

EXPERT TESTIMONY.

See "EVIDENCE" § 10.

FARM LEASE.

See "LANDLORD AND TENANT."

FERRIES.

Legislative grant of right to maintain and operate a ferry across Lake Champlain from Rouses Point, N. Y. to Alburg, Vt., is not a grant of a ferry franchise from the Vermont shore. *Jones v. Hoag*, 78.

A state may grant a franchise for a ferry from its own shore across a boundary river or lake which will be valid within its limits. *Ibid.*

A state cannot grant a valid ferry franchise from the shore of the state on the other side of a boundary river or lake to its own shore. *Ibid.*

FINDINGS OF FACT.

See "TRIAL" § 7.

FISH AND GAME.

See "CRIMINAL LAW" § 6.

A game warden is not a general public officer of the State, his authority being wholly derived from the statutes and expressly defined thereby. *Villa v. Thayer*, 81.

In the absence of statute authorizing it, a game warden has no authority to shoot dogs caught in the act of chasing deer. *Ibid.*

Nothing is to be deemed a public nuisance solely by reason of its relations to the destruction of wild game unless declared so by statute. *Ibid.*

In a prosecution for maintaining posters prohibiting fishing in violation of No. 201, Acts 1912, § 57 (G. L. 6443), it is not necessary to show that posters were of size and description prescribed by statute where they attracted attention and were maintained for purpose of keeping fishermen away. *State v. Mack*, 103.

In such case, not error to admit a deed to the respondent under exception that there was no evidence that the posters were on land described therein, there being evidence that he owned and occupied the premises covered by the deed, and that the posters complained of were on his home place. *Ibid.*

The power of proper regulation of common fishery in the public waters is reserved to the Legislature by the Constitution (Chapter II, sec. 63). *Hazen v. Perkins*, 414.

No. 140, Acts of 1896, and No. 288, Acts of 1908 were proper measures for the protection of common fishery in Lake Morey. *Ibid.*

FOREIGN CORPORATIONS.

See "CORPORATIONS."

FORFEITURE.

See "LANDLORD AND TENANT."

FRAUD.

See "APPEAL AND ERROR" § 5 (D); "EVIDENCE" § 4; "PRINCIPAL AND AGENT."

§ 1. Deception Constituting Fraud and Liability Therefor.

In an action for deceit, actual motive to injure the plaintiff is not essential. If a false representation is made with knowledge of its falsity, the intent to deceive is presumed. *McDonald v. McNeil*, 356.

Liability for deceit grows out of fact that plaintiff has been misled to his prejudice. The fact that defendant gained nothing by the deception is immaterial. *Ibid.*

In an action for fraud in which the defendants were charged with a conspiracy to defraud plaintiff, the question of a conspiracy was important only as it gave character to the individual acts of the defendants, and charged all with the legal consequences of such acts. *Arnold v. Somers*, 512.

Elements necessary to constitute actionable fraud in the sale of property by false representations. *Ibid.*

In an action for fraud in the sale of the manufacturing rights of a vending machine, wherein the seller's salesman was to have a half interest which was paid for by his commission on the sale, of which fact plaintiff was ignorant, the salesman's representations

that he had the means to pay for a half interest in the rights and would pay cash for the same, were not actionable. *Ibid.*

§ 2. Actions.

A request to charge which included the right of plaintiff to rely upon representations of defendant regarding lands not included in the case was properly refused. *Vermont Box Co. v. Hanks*, 92.

A request to charge concerning the false representations of the defendant, which omitted the element of the falsity of the representations, was properly refused. *Ibid.*

In action for deceit in the sale or exchange of real or personal property, the damages are to be measured by the difference between the property as it is and as it would be as represented. This rule applies where defendant induced plaintiff to furnish money to buy land, take the title jointly with defendant, and give him credit for his half of the investment. *McDonald v. McNeil*, 356.

There being evidence tending to show fraud on the part of defendant, his motion for a directed verdict was properly overruled. *Ibid.*

Where the complaint alleges that the alleged misrepresentations were falsely and fraudulently made, no express averment of an intention to deceive is necessary. *Ibid.*

In an action for fraud in the sale of the manufacturing rights of a vending machine, where it appeared that the machine had a structural defect which materially affected its value, the question whether a representation that the machine was perfect and the best of its kind in existence was an expression of opinion or an assertion of fact was for the jury. *Arnold v. Somers*, 512.

The essential elements of fraud having been established, the rule of *caveat emptor* did not apply. *Ibid.*

That the plaintiff had the opportunity, which was exercised, to examine the machine and its operation bore only upon the question whether he relied upon the false representations and was deceived thereby. *Ibid.*

The plaintiff having disposed of the manufacturing rights to a corporation at a profit by taking stock in payment, and there being evidence that the corporation became bankrupt because the rights were valueless, the question whether the alleged fraud resulted in damage to him was for the jury. *Ibid.*

Evidence that the machine in question was as perfect or more perfect than the other machines on the market used for a like purpose was properly excluded. *Ibid.*

Evidence of the amount of property owned by the salesman at the time of the sale of the rights was admissible under the allegation that he represented that he had sufficient means to purchase one-half of the rights. *Ibid.*

An instruction that the jury "will inquire whether there is any evidence tending to show conspiracy or fraud," and another, referring to certain evidence, "does that evidence tend to show fraud and conspiracy?" when considered with the rest of the charge, was not misleading. *Ibid.*

A request for an instruction that no misrepresentation is fraudulent unless made with the knowledge of its falsity, and such knowledge cannot be presumed from the mere falsity of the representation, was properly refused. *Ibid.*

FRAUDS, STATUTE OF.

See "ADVERSE POSSESSION."

FRAUDULENT CONVEYANCES.

See "TRUSTEE PROCESS."

Voluntary conveyance of property is fraudulent in law as to creditors, and good faith of grantee is immaterial. *Ludlow Savings Bank & Trust Co. v. Knight*, 171.

Generally, to make conveyance for valuable consideration fraudulent, there must be fraudulent intent by both grantor and grantee. *Ibid.*

Generally, transfer of property for future support is invalid as to creditors of grantee, unless he retains property ample to pay his debts. *Ibid.*

FUTURE SUPPORT, CONVEYANCES FOR.

See "FRAUDULENT CONVEYANCES"; "TRUSTEE PROCESS."

GAME LAWS.

See "FISH AND GAME."

GIFTS.

See "ADVERSE POSSESSION."

Parol gift of land creates only tenancy at will. *Pope v. Hogan*, 250.

HABEAS CORPUS.

Judgment on *habeas corpus* remanding prisoner is not, as matter of law, bar to subsequent proceedings of the same kind on the same facts. *In re Turner*, 210.

Writ of *habeas corpus* challenges the jurisdiction alone, and extends to jurisdiction to render the particular judgment. *Ibid.*

Question raised under writ of *habeas corpus* on ground that relator is unlawfully imprisoned after conviction of a crime is whether the complaint is void for failure to describe an offence of which the court has jurisdiction. *Ibid.*

HIGHWAYS.

§ 1. Generally.

Intersection of a path across a village common with a highway is not an intersection of highways within the meaning of P. S. 4094, as amended by No. 147, Acts 1912 (G. L. 4709). *Aiken v. Metcalf*, 57.

The record of a resurvey of a highway under G. L. 4394 must affirmatively show all facts essential to give the selectmen jurisdiction. *Berkshire v. Nelson & Hall Co.*, 440.

If selectmen have jurisdiction to make a resurvey of a highway, where the resurveyed boundaries are the same as those of the original survey, without giving notice of hearing to the abutting land owners, their jurisdiction is dependent on such facts affirmatively appearing in their record of the resurvey. *Ibid.*

Resurvey of a highway is void where selectmen's record states that the resurvey followed *approximately* the original survey, and fails to show that notice of hearing was given to abutting land owners. *Ibid.*

§ 2. Injuries from Defects and Obstructions.

In an action for decedent's death caused by the car he was driving tumbling over an alleged insufficient culvert, the question of the insufficiency of the culvert for lack of a railing or guard suitable to the place and condition was for the jury. *Bigelow, Admr. v. St. Johnsbury*, 423.

Evidence that decedent had said he might have to stop driving nights because, when he met a car, the reflection was so strong on the windshield that it reflected on his glasses and bothered him to see

the road, does not prove, as matter of law, that he was negligent in driving his car at the time of the accident. *Ibid.*

Evidence that after the accident the brakes of decedent's car were found to be loose does not prove, as matter of law, that at the time of the accident he violated the law in not providing his car with an adequate brake, and in approaching a curve without having his car under perfect control. *Ibid.*

Statute requiring one injured through insufficiency of a bridge or culvert to give notice to the town does not apply to persons financially injured through the death of their next of kin. *Ibid.*

HOMICIDE.

See "CRIMINAL LAW"; "INDICTMENT AND INFORMATION."

§ 1. Excusable or Justifiable.

If a party has other available means of avoiding an assault, which appear to him at the time as sufficient, he cannot use force in self-defence. *State v. Albano*, 51.

§ 2. Evidence.

Evidence of self-defence was not admissible, it not appearing that respondent was threatened with serious bodily harm nor that he reasonably apprehended that he needed to use such means in his defence. *State v. Albano*, 51.

HUSBAND AND WIFE.

See "EVIDENCE" § 7; "TENANCY BY ENTIRETY"; "TRUSTS";

"WITNESSES" § 1.

§ 1. Generally.

Husband and wife are seized jointly in the wife's right of real estate conveyed to her not for her sole and separate use; and as to such property she is under the common law disability. *Fadden v. Fadden*, 350.

Real estate of a married woman not held to her sole and separate use cannot be taken in execution against her. *Ibid.*

It will be presumed that a married woman holds personal property as her separate estate; and it is for him who asserts that such property was acquired by her by gift from her husband to prove it. *Stockwell v. Stockwell's Est.*, 489.

- An antenuptial arrangement whereby a husband took title to a timber lot to himself, and held it for his wife and agreed to lumber it for her benefit, created a trust relation between them. *Ibid.*
- In such case, where the trust was fully performed and ended in the husband's lifetime, except as to the matter of accounting, an action at law could be maintained by the *cestui* against his estate. *Ibid.*
- In such case, an agreement by the parties that the husband could use the money received from the sale of the lumber cut on the lot for a short time was not a waiver of an accounting, but merely a postponement thereof. *Ibid.*
- A wife's claim for money loaned to her husband either before or after the marriage, does not outlaw as long as the marriage relation continues. *Ibid.*
- A married woman can make contracts and bind herself and property at law only so far as the statute authorizes her to do so. *Seaver v. Lang*, 501.
- When a married woman enters into a contract affecting her property not held to her sole and separate use, her responsibility is to be measured by the common law, and not by the statute. *Ibid.*
- The real estate of a married woman is not held to her sole and separate use except where there is some provision so limiting it in the contract, deed, or decree by which she acquires it. *Ibid.*
- Under G. L. 3521, a married woman may buy real estate on credit and bind herself for its payment and that she has no separate estate does not affect her personal liability. *Ibid.*
- In determining whether a debt contracted by a married woman is in fact the debt of her husband, the real purpose and character of her undertaking rather than its form controls. *Ibid.*
- Where the defendant and her husband deeded his land to plaintiffs in consideration of their paying his debts, and they gave her a contract by which they agreed to sell, and she to buy the same, the debt so contracted by her was her debt, and not her husband's, if the arrangement between herself and her husband was that she could have what she could save out of the property, and she contracted with plaintiffs with that end in view, and on her own account, and for her own benefit. *Ibid.*
- A married woman acting for her husband, a disclosed principal, may bind herself by a contract in her own name. *Ibid.*

§ 2. Criminal Conversation.

In an action by husband, the wife can testify in his behalf of her own *liaison* with the defendant. *Phelps v. Utley*, 40.

In such case, evidence that wife was agitated and wept when interviewed prior to the trial regarding her improper relations with defendant is not admissible for the purpose of corroborating her testimony. *Ibid.*

IMPLIED CONTRACTS.

See "CONTRACTS" § 1.

INDICTMENT AND INFORMATION.

See "ADULTERY"; "CRIMINAL LAW" §§ 1, 6; "INTOXICATING LIQUORS."

§ 1. Generally.

The description of an offence charged against an accused must be found in the complaint unaided by extrinsic facts. *State v. Villa*, 121.

An inadequate complaint cannot be made sufficient by a specification or bill of particulars. *Ibid.*

A complaint is sufficient when it sets forth the offence charged with such particularity as will reasonably indicate the exact offence, and will enable the accused to plead his conviction in a subsequent prosecution for the same offence. *Ibid.*

The Legislature cannot legalize a form of complaint which fails to meet the requirements of the Constitution. *Ibid.*

It is unnecessary to allege in an information for advertising and holding one's self out to the public as a physician and surgeon that the respondent practiced medicine without a license. *State v. Kaatz*, 497.

When the trial court overrules a respondent's demurrer to a complaint, it is within its discretion to send, or to refuse to send, the case to the Supreme Court before a final trial. *Ibid.*

A respondent's demurrer to a complaint which has been overruled is not waived by going to trial on the merits. *Ibid.*

§ 2. Conviction of Offence Included in Charge.

Under an indictment for an assault to kill "being armed with a dangerous weapon," there may be a conviction of an assault with intent to kill, or of a simple assault. *State v. Albano*, 51.

An indictment charging the highest degree includes the lower degrees.
Ibid.

INFANTS.

See "CONTRACTS" § 1.

INSURANCE.

Unpaid assessment on fire insurance policy is a valid debt due from insured to insurer, and can be used by insurer in part payment of sum due insured under policy for loss by fire. *B. & M. R. R. v. Union Mutual Fire Ins. Co.*, 137.

In action to recover upon fire insurance policy, not error to overrule defendant's motion for verdict on ground that plaintiff had failed to furnish defendant with amended proof of loss as required by G. L. 5567, where plaintiff elected to stand upon sufficiency of proof of loss already filed. *Brown v. Vt. Mutual Fire Ins. Co.*, 272.

If proof of loss filed is sufficient it is not rendered void by failure to furnish amended proof under G. L. 5567. *Ibid.*

In ascertaining damages in action upon fire insurance policy, jury may consider cost of replacing buildings burned with ones of equal value. *Ibid.*

INTOXICATING LIQUORS.

See "CRIMINAL LAW" § 1; "INDICTMENT AND INFORMATION" § 1;
"SALES" § 1.

A complaint charging that respondent did "sell intoxicating liquor without authority" is bad under the provisions of Chap. 1, Art. 10 of the Vermont Constitution, because it does not sufficiently inform the accused of the particular offence charged. *State v. Villa*, 121.

In prosecution for illegal sale of intoxicating liquor, testimony that witness went to respondent's house with two other persons, and got some whiskey there, and drank some of it with the others, but did not know who called for it or who brought it out, is admissible. *State v. Ceresa*, 190.

In prosecution for illegal sale of intoxicating liquor, evidence that persons were seen on different occasions going to respondent's house, having no apparent business there, is admissible. *State v. Avicoli*, 287.

Failure of a soliciting agent of a fourth-class licensee to comply with G. L. 6490, 6491, requiring certification, does not make sales of intoxicating liquor solicited by him illegal. *Fitzgerald Bros. Brewing Co. v. Kelley's Est.*, 471.

Arrangement by plaintiff, fourth-class licensee, whereby only a part of the liquors billed to S., a seventh-class licensee, was to be sold and paid for under his license, and the remainder was to be kept in cold storage by him and delivered by him with a team provided by plaintiff to other customers of plaintiff on notice by it, and for which the plaintiff was to collect the pay and give S. credit for the same, was not illegal and in violation of G. L. 6490 if *bona fide* and not designed as a cover for illegal sales by S. *Ibid.*

In such case, the true intent of the arrangement was a question for the jury. *Ibid.*

JOINT TENANCY.

See "ADVERSE POSSESSION"; "EVIDENCE" §§ 6, 7; "TENANCY IN COMMON"; "TENANCY BY ENTIRETY."

JUDGMENTS.

See "EVIDENCE" § 1.

Jurisdiction of a court of another state in decreeing an annulment of marriage can be attacked in a collateral proceeding in a court of this State. *Deyette v. Deyette*, 305.

Judgment of annulment of marriage rendered in another state by a court having jurisdiction of the parties and of the subject matter cannot be impeached by either of the parties thereto in a collateral proceeding, by reason of false testimony given at the time. *Ibid.*

Plaintiff in divorce proceeding cannot impeach judgment of a court in another state annulling a former marriage of defendant, on the ground of false testimony given at the time. *Ibid.*

A party is not precluded by a judgment against him by default from claiming in a subsequent action brought by him against the plaintiff in the former suit, items of indebtedness which existed before the rendition of the default judgment. *Hutchins v. George*, 371.

JUDICIAL ACTS.

A judicial act is an act in a matter calling for the exercise of judgment and discretion. *Vermont Fruit Co. v. Wilson*, 112.

JUDICIAL NOTICE.

See "EVIDENCE" § 1; "STATUTES."

JURY.

See "CRIMINAL LAW" § 5 (B); "TRIAL" § 3.

A challenge to the array need not be in writing. *Vermont Box Co. v. Hanks*, 92.

Grounds for challenge to the array may be proved by oral testimony. *Ibid.*

Party cannot as of right challenge the array after a challenge to the poll. *Ibid.*

Court may, in its discretion, before jury is sworn, where ground for same is not previously known, permit a challenge to the array after challenge to the poll. *Ibid.*

If a party to an action to be tried at a term of court participates in the drawing or summoning of the jurors to serve at the same term the array should be quashed. *Ibid.*

LACHES.

See "EQUITY" § 1.

LAND CONTRACT.

See "VENDOR AND PURCHASER."

LANDLORD AND TENANT.

See "ADVERSE POSSESSION"; "EVIDENCE" § 4; "NEGLIGENCE" § 3; "PARTIES."

As between landlord and tenant, it is the duty of tenant, in first instance, to see that his premises are safe for those coming there by his invitation. *Beaulac v. Robie*, 27.

In the absence of agreement to make repairs, the landlord is not liable for injuries due to defective condition of premises arising while tenant is in possession and control. *Ibid.*

If landlord retains control of portion of leased premises he is responsible for injuries received by persons rightfully there. *Ibid.*

Landlord and tenant are not jointly liable for injuries due to defect in leased premises unless the premises were under their joint control. *Ibid.*

Lessees of part of river bed cannot acquire by adverse possession right to harvest ice while occupying premises and paying rent. *Whittier v. Montpelier Ice Co. et al.*, 107.

Eviction by landlord, to suspend obligation of tenant to pay rent, must result from wrongful act. *Powell v. Merrill*, 124.

Mere breach of covenant in lease does not, in absence of special stipulation, work a forfeiture of the term or give the landlord a right of re-entry. *Ibid.*

Stipulation in lease for a forfeiture will be strictly construed. *Ibid.*

Where findings of fact do not show breach of conditions in lease, landlord cannot justify re-entry upon provision in lease giving him right to re-enter for that reason. *Ibid.*

Where acts of landlord result in depriving tenant of enjoyment of premises, the intent to oust tenant will be conclusively presumed. *Ibid.*

Eviction of tenant by landlord from part of leased premises suspends obligation to pay rent in its entirety. *Ibid.*

Where tenant has been actually evicted by landlord, no demand for restoration to the premises is necessary to protect his rights. *Ibid.*

Where landlord sues tenant for rent and deprives him of possession by the attachment, promise of tenant to pay rent due and his endeavor to secure release from further liability is not a waiver of his right to claim eviction by landlord in defence to another suit to recover rent accrued subsequent to commencement of first suit. *Ibid.*

That tenant has received and retained rent from a sub-lessee of part of leased premises does not affect his right to claim a partial eviction in defence to suit by landlord to recover rent. *Ibid.*

Parol gift of land creates tenancy at will which may ripen into a perfect title by adverse possession. *Pope v. Hogan*, 250.

Where lease of farm on shares providing that lessee should leave at end of term same amount of hay and fodder as was on farm at date of lease was terminated by agreement before its term had expired, lessee was properly charged with all shortage in that respect. *McBride v. McNall*, 326.

LAST CLEAR CHANCE.

See "NEGLIGENCE" § 2.

LEASES.

See "LANDLORD AND TENANT."

LIMITATION OF ACTIONS.

See "HUSBAND AND WIFE."

MALICIOUS ARREST.

See "ACTION."

MARRIED WOMAN.

See "HUSBAND AND WIFE."

MASTER AND SERVANT.

See "ELECTRICITY"; "EVIDENCE" §§ 4, 10; "NEGLECT" §§ 1, 2;
"TRIAL" § 4.

§ 1. Master's Liability for Injuries to Servant.

Where master furnishes servant electric light and cord for use in doing his work, it is master's duty to exercise high degree of care to keep the apparatus safe. *Spinney's Admr. v. Hooker*, 146.

Where it is duty of master to make inspection, and a reasonable inspection is not made, master is liable for injuries sustained by servant by reason of dangerous condition existing. *Barclay v. Wetmore & Morse Granite Co.*, 195.

Where duty of inspection is on master, servant is justified in assuming that master has performed his duty, and relying upon it without inspection for himself. *Ibid.*

Servant has right to assume that master will warn and save him from needless exposure to injury. *Ibid.*

Plaintiff, employed to oil machinery in defendant's mill, but not instructed as to location of places to be oiled, was within the line of his duty in going into a place where there was no machinery while searching for a hot box, if in so doing, he acted reasonably. *Johnson v. Doubleday*, 267.

Wherever a servant may reasonably be expected to go is a part of his working place to which the safe place doctrine applies. *Ibid.*

Duty of inspecting floor of a mill is upon master, and servant has a right to assume that this duty has been performed. *Ibid.*

§ 2. Actions.

Question whether it was defendant's duty, after having made a blast in a granite quarry, to make an inspection before ordering a second blast, was for the jury. *Barclay v. Wetmore & Morse Granite Co.*, 195.

Questions of defendant's negligence and plaintiff's contributory negligence were for the jury. *Ibid.*

Single act of negligence on part of servant is not in itself evidence of incompetency, and it is error, under such circumstances, to submit the question of the servant's incompetency to the jury. *Ibid.*

In an action for personal injuries, question of whether or not at time of accident servant was where he might reasonably be expected to go by the requirements of his engagement was for the jury. *Johnson v. Doubleday*, 287.

Where evidence is not all one way questions of negligence and contributory negligence are for the jury. *Ibid.*

No variance between the allegations in the declaration of failure to provide plaintiff with a safe place in which to work and the proof of the same. *Ibid.*

MINISTERIAL ACTS.

See "PROCESS."

A ministerial act is one in which the exercise of judgment and discretion is not required. *Vermont Fruit Co. v. Wilson*, 112.

MISJOINDER.

See "PLEADING."

MORTGAGES.

Where the makers of a mortgage and note assigned without notice to them made payments on the note to the mortgagee believing him to be the owner thereof, and who the assignee expected to collect the note from the mortgagors, equity will treat such payments as made to the mortgagee as agent of the assignee to be applied upon the note. *City Savings & Trust Co. v. Peck*, 310.

MUNICIPAL CORPORATIONS.

Liability of a municipality for negligence in the construction and maintenance of water systems, lighting plants, etc., which are for its private advantage and emolument, is that of a natural person. *Morgan v. Stowe*, 338.

A municipality is exempt from liability when injury results from the negligent performance of a governmental duty by one authorized to perform it, though it bears the expense of performance. *Ibid.*

Where the acts alleged to have been done by defendant village in the construction of a fire department and location of a hydrant could

not have been done without some kind of an organized system, it will be presumed that they were done under its charter. *Ibid.*

A hydrant connected with a water main and installed in a village street for purposes of fire protection under village charter is not a part of village's water system constructed for its benefit or emolument, but is for the exclusive use of the public. *Ibid.*

It is not necessary for an act to be performed by any particular officer to give it a public or governmental character, but it is enough if the act is performed by one having legal authority so to do. *Ibid.*

In an action against a municipality to recover for damages caused by the negligent location of a hydrant, where it does not appear who located it, it will be assumed to have been located by some one having legal authority to do so. *Ibid.*

Hydrants and apparatus for the extinguishment of fires in a municipality are in their nature public or governmental property, and their location a public or governmental act; and no action will lie against the municipality for negligence in their use and maintenance. *Ibid.*

The action of village trustees in deliberating upon a plan of location of hydrants for fire protection is in its nature judicial, and no action lies for errors of judgment or want of foresight therein. *Ibid.*

MUNICIPAL COURTS.

See "COURTS."

MURDER.

See "HOMICIDE."

NAVIGABLE WATERS.

See "FISH AND GAME."

Lake Morey is public waters within the provision of the Constitution (Chap. II, sec. 63). *Hazen v. Perkins*, 414.

Presumed that fish and game commissioners in constructing a dam and sluice at the outlet of Lake Morey acted in accordance with the law and their statutory instructions, and that rights of riparian proprietors were not violated. *Ibid.*

Grants of land bounding upon a boatable lake pass title only to the water's edge, or to low water mark. *Ibid.*

Title to waters of a boatable lake, or to the lands covered by the same, cannot be acquired by grants from private sources. *Ibid.*

The waters and bed of boatable lakes are held by the people in trust for the public uses for which they are adapted. *Ibid.*

Legislature cannot grant to private persons for private purposes the right to control the flow of water from a boatable lake by artificial means. *Ibid.*

A grant of the right to control the height of the water of a boatable lake, or the outflow therefrom, by artificial means, for private purposes, cannot be intended as a basis of a decree. *Ibid.*

Right to control the flow of water from a boatable lake by artificial means cannot be acquired by prescription. *Ibid.*

Lower mill owner has no right, by artificial means, to vary the level of the water of a boatable lake as regulated and controlled by a dam lawfully erected at its outlet by the State. *Ibid.*

A gate and flashboards unlawfully placed at the outlet of a boatable lake whereby the natural level of the lake as regulated and controlled by the State is varied, constitute a public nuisance, against which a remedy can be had in behalf of the State, either in equity or by way of criminal prosecution. *Ibid.*

In a private suit to enjoin defendant from maintaining a public nuisance by unlawfully raising and lowering the water of a boatable lake by artificial means, where defendant has suffered nominal damages only apart from the general injury to the public, the bill will be dismissed. *Ibid.*

NEGLIGENCE.

See "CARRIERS"; "ELECTRICITY"; "EVIDENCE" §§ 4, 10; "LANDLORD AND TENANT"; "MASTER AND SERVANT" § 1; "MUNICIPAL CORPORATIONS"; "RAILROADS"; "TRIAL" § 4.

§ 1. Generally.

Negligence and incompetency are not convertible terms. *Barclay v. Wetmore & Morse Granite Co.*, 195.

The words "unavoidable accident" and "pure and simple accident" as applied to collisions exclude the idea of negligence. *Larrow v. Martell*, 435.

§ 2. Proximate Cause of Injury.

Last clear chance rule does not apply when plaintiff's negligence is concurrent and of the same degree as that of defendant. *Aiken v. Metcalf*, 57.

Request properly refused which permits the jury to find for plaintiff although his negligence may have proximately contributed to his injury. *Ibid.*

Where person was killed by coming in contact with electric wire from which the insulation had been worn off, the lack of insulation was a proximate cause of the accident. *Spinney's Admr. v. Hooker*, 146.

§ 3. Actions.

Persons claiming damages on the ground that they were invited into a dangerous place must sue the person who invited them. *Beaulac v. Robie*, 27.

Where the evidence is equally consistent with the existence or non-existence of liability by the defendant, it is error to submit that question to the jury. *Dodge Bros. v. C. V. Ry. Co.*, 454.

§ 4. Question for Jury.

Cases in which the question of negligence was for the jury. *Porter Screen Mfg. Co. v. C. V. Ry. Co.*, 1; *Baldwin v. Gaines*, 61; *Spinney's Admr. v. Hooker*, 146; *Barclay v. Wetmore & Morse Granite Co.*, 195; *Bigelow, Admr. v. St. Johnsbury*, 423; *Dodge Bros. v. C. V. Ry. Co.*, 454.

NEGOTIABLE INSTRUMENT ACT.

See "BILLS AND NOTES" § 2.

NEW TRIAL.

See "CRIMINAL LAW" § 5 (A).

§ 1. Nature and Scope of Remedy.

Every petition for a new trial must fail or prevail according to the strength of its appeal to the judgment and conscience of the Court. *In re Ketchum*, 280.

Application of the rule that where error inheres in a single issue the Court will grant a retrial on that issue alone, rests in the sound discretion of the Court. *Gaines v. Baldwin*, 451.

Rules governing petitions for new trials do not necessarily obtain in a case where a retrial has been granted on a single issue, and, if, on suggestions made by counsel at the time of the decision of the Supreme Court, or by a petition for a new trial thereafter sea-

sonably brought, it appears that justice will be promoted by an unrestricted trial of all the issues in the case, the same will be granted. *Ibid.*

In case where judgment for the plaintiff was reversed on the question of damages only, a new trial ordered on all issues; it appearing from the petition that thereby the ends of justice would be subserved. *Ibid.*

§ 2. Grounds.

(A) Errors and Irregularities in General.

New trial granted on ground that defendant was denied opportunity to meet testimony produced by plaintiff after latter had rested, which he could otherwise have done. *Phelps v. Utley*, 40.

(B) Newly Discovered Evidence.

Petition must show that the evidence relied upon is newly discovered, and could not with reasonable diligence have been discovered and produced at the trial. *Rawleigh Co. v. Pierce*, 44.

New trial will not be granted where the facts alleged to be newly discovered were ascertained by the officers and agents of petitioner corporation prior to trial while acting for it within the scope of their authority. *Ibid.*

A plaintiff corporation which failed to secure the attendance at the trial of its officers and agents who were able to give evidence upon the issues raised did not use due diligence in obtaining evidence. *Ibid.*

(C) Surprise, Accident, Inadvertence or Mistake.

Evidence introduced by defendants in support of a notice that they should deny their signatures to the instrument on which suit was brought is not ground for a new trial for surprise, no continuance or delay having been asked for. *Rawleigh Co. v. Pierce*, 44.

NUISANCE.

See "NAVIGABLE WATERS."

§ 1. Public Nuisance.

Nothing is to be deemed a public nuisance solely by reason of its relations to the destruction of fish and game, unless declared so by statute. *Villa v. Thayer*, 81.

Remedy against public nuisance may be had in behalf of the State either in equity or by way of criminal prosecution. *Hazen v. Perkins*, 414.

To entitle individual to maintain private injunction suit against public nuisance he must show that he has suffered injury distinct from the general injury to the public. *Ibid.*

Right to maintain a public nuisance against an individual who has suffered a peculiar injury cannot be acquired by prescription. *Ibid.*

PARTIES.

See "LANDLORD AND TENANT"; "NEGLIGENCE" § 3; "TRIAL" § 1.

Two defendants jointly charged in an action of tort can be held jointly or severally liable, as the evidence warrants. *Beaulac v. Robie*, 27.

The claimant of funds in trustee process is so far a party to the suit, that, before being admitted as a party claimant, he can take a deposition in support of his claim. *Vermont Fruit Co. v. Wilson*, 112.

PAUPERS.

See "DOMICILE."

Question of change of residence by an alleged pauper is one of fact to be determined on the evidence as to the intent with which the change was made, combined with that bearing upon the actual removal. *Glover v. Greensboro*, 34.

A finding that a pauper last resided for three consecutive years in a certain town, supporting himself, determines the liability of that town for his support. *Mount Holly v. Cavendish*, 38.

PAYMENT.

See "MORTGAGES."

PHYSICIANS AND SURGEONS.

See "INDICTMENT AND INFORMATION" § 1.

PLEADING.

See "BOOK ACCOUNT"; "FRAUD" § 2; "MUNICIPAL CORPORATIONS"; "PRACTICE ACT"; "REFERENCE."

A declaration in case can be amended by adding a count in trover. *Fowler v. Rogers*, 56.

Defences are inconsistent only when they cannot both be true. *Bradley v. Blandin*, 313.

On demurrer, the facts set out in the declaration are taken to be true. *Morgan v. Stone*, 338.

A specification may show defendant how to plead to a complaint, but it cannot itself be pleaded to. *N. Y. C. R. R. Co. v. Clark*, 375.

A demurrer admits only such matters as are well pleaded. *Ibid.*

POSSESSION.

See "ADVERSE POSSESSION."

PRACTICE ACT.

See "BOOK ACCOUNT"; "PLEADING."

Question whether a special plea amounts to the general issue cannot be raised. *Roberts v. Danforth*, 88.

Answer should state all grounds of defence relied upon not inconsistent with each other, and may properly be divided into separate paragraphs. *Bradley v. Blandin*, 313.

If an answer sets forth inconsistent defences, the better practice is to take advantage thereof by a motion to strike out. *Ibid.*

An answer denying a contract alleged in the complaint may properly state facts explanatory of the denial, and is not open to objection that it amounts to the general issue. *Ibid.*

Demurrer to part of an answer cannot be sustained unless the part demurred to, as a whole, shows no defence. *Ibid.*

It is consistent with the Practice Act and the Court Rules that a plea or answer wholly irrelevant and calculated to distort the course of the law should be held insufficient, although the demurrer thereto does not in terms point out its real character. *N. Y. C. R. R. Co. v. Clark*, 375.

Under Practice Act, as well as prior thereto, a plea in offset in the common counts may be amended by adding a count for breach of warranty. *Globe Granite Co. v. Clements*, 383.

It was not error, after the verdict and before judgment, to permit plaintiffs to amend their declaration by filing an appropriate common count. *Seaver v. Lang*, 501.

PRESUMPTIONS.

See "ADVERSE POSSESSION"; "APPEAL AND ERROR" § 4 (B); "CARRIERS"; "DEPOSITIONS"; "EVIDENCE" § 2; "MUNICIPAL CORPORATIONS"; "NAVIGABLE WATERS"; "REFERENCE"; "TENANCY IN COMMON."

PRINCIPAL AND AGENT.

See "EVIDENCE" §§ 4, 6, 7.

The general manager of a telephone company is personally bound by a contract made by him on behalf of the company for the care and treatment of one who had been injured while in the employ of the company if he did not have authority to bind the company by the contract. *Brightlook Hospital Ass'n v. Garfield*, 353.

Where there is nothing on the face of a note to show that the maker signed it as agent of another, he is personally liable on the same. *In re Barron's Est.*, 460.

Every agency is subject, as matter of law, to the legal limitation that it cannot be used for the benefit of the agent himself or of any person other than the principal in the absence of an agreement that it may be so used. *Arnold v. Somers*, 512.

In an action for fraud in the sale of manufacturing rights, there being evidence that the selling corporation, with knowledge that its salesman was personally interested in the sale of the rights, authorized him to act as its agent in the negotiations with the plaintiff, the question of its liability for the false representations of its salesman was properly submitted to the jury. *Ibid.*

There being no evidence to connect the president of the selling corporation with its salesman's fraud, he was not liable under the doctrine of *respondet superior*; the salesman not acting as his agent. *Ibid.*

PRINCIPAL AND SURETY.

See "BILLS AND NOTES."

The discontinuance in good faith of an attachment suit commenced against the maker of a note without the request of a surety will not release the surety. *Howard National Bank v. Arbuckle*, 84.

PROBATE COURT.

See "EQUITY" § 1; "WILLS" § 3.

PROCESS.

Signing of a writ of attachment, a summons, or a citation is a ministerial act, and may be done by the attorney for the party at whose instance the process is issued. *Vermont Fruit Co. v. Wilson*, 112.

PROXIMATE CAUSE.

See "NEGLIGENCE" § 2; "RAILROADS."

May be more than one proximate cause concurring to produce a result. *Spinney's Admrz. v. Hooker*, 146.

QUESTION OF LAW AND FACT.

See "TRIAL" § 4.

RAILROADS.

See "CARRIERS."

In an action for damages for colts killed on defendant's railroad, that had escaped through a gate in a fence which the defendant was bound to maintain for the plaintiffs, the question whether a loose hook on the gate was the proximate cause of the gate being open and the colts escaping was for the jury. *Dodge Bros. v. C. V. Ry. Co.*, 454.

Under G. L. 5195, making it the duty of a railroad to maintain a sufficient fence, it is the duty of the land owner, for whom the fence is maintained, to keep a gate therein closed; and it was error for the court to charge the jury that the defendant's failure to keep the gate closed would amount to a failure to maintain a sufficient fence at that point. *Ibid.*

The fact that such a gate was found open is not enough to impute negligence to, or establish liability on the part of, the railroad company. *Ibid.*

REARGUMENT.

See "APPEAL AND ERROR" § 4.

RECEIPTS.

See "EVIDENCE" §§ 3, 9.

Writing in question held to be a receipt and not a contract. *Drown v. Chesley's Est.*, 19.

REFERENCE.

Referee need not state in his report that all facts appearing in evidence have been detailed, nor catalogue the evidence and dispose of it categorically. *McBride v. McNall*, 326.

Trial court may recommit referee's report to supply facts material to the issues which he has failed to find and report, but is justified in presuming regularity until the contrary is shown. *Ibid.*

On hearing on referee's report, in which transcript is referred to, trial court has right to refer to transcript, and general right to inquire *dehors* the record in ascertaining whether an amendment to a plea in offset should be allowed. *Globe Granite Co. v. Clements*, 383.

Where a claim in offset is not designated as for a breach of warranty, but is treated as such on the trial before a referee, it is not error, on hearing upon referee's report, to allow an amendment to the plea which averred a breach of warranty. *Ibid.*

When a cause is referred, the pleadings are to be treated as adapted to the facts found when no new cause of action is thereby brought in, and the formal pleadings may be treated as amended or may be actually amended before judgment. *Ibid.*

RES IPSA LOQUITUR.

See "ELECTRICITY."

RIGHT OF WAY.

See "ADVERSE POSSESSION."

SALES.

See "CONTRACTS" §§ 1, 2; "TRIAL" § 6.

§ 1. Generally.

Vendees are by law bound to pay the contract price, and their expectation when they received the property that the price would be less is immaterial. *Dexter & Carpenter v. Fillmore & Slade*, 247.

In a suit to recover from the estate of K. on an original promise by him in his lifetime to pay for certain intoxicating liquors sold and delivered to S., the question whether the sales were to S. on K.'s credit, or to K. personally, was for the jury. *Fitzgerald Bros. Brewing Co. v. Kelley's Est.*, 471.

In such case, the question whether K.'s promise to pay for the liquors was original or collateral was for the jury. *Ibid.*

§ 2. Warranties.

A positive provision in a contract for the manufacture and sale of a granite monument that it should be sound and free from cracks is an express warranty against specific defects. *Globe Granite Co. v. Clements*, 383.

In absence of showing to contrary, price paid for a granite monument is evidence of its value if it had been as warranted, and cost of making it as warranted is evidence tending to show how much its actual value fell short of the value of the warranted monument. *Ibid.*

For the breach of an express and absolute warranty contained in the contract for the manufacture and sale of an article, the vendee

can bring an independent suit or he can plead the same in offset to an action of contract brought by the vendor against him. *Ibid.*

SELF-DEFENCE.

See "HOMICIDE."

STATUTES.

See "WORDS AND PHRASES."

A statute will not be construed as repealing a former act on same subject matter in absence of express words to that effect, unless they are so inconsistent that they cannot stand together, or unless such is the evident intent. *In re Turner*, 210.

Judicial notice taken that No. 101, Acts 1915, was prepared by National Conference of Commissioners on Uniform State Laws and has been adopted by several other states. *Ibid.*

Legislative history of an enactment may be referred to for aid in arriving at the intent and purpose of the Legislature as expressed in the act. *Fidelity & Deposit Co. v. Brown*, 390.

In considering a statute an absurd purpose will not be attributed to the lawmakers, and a construction leading to an absurd consequence will always be avoided. *Bigelow, Admr. v. St. Johnsbury*, 423.

Changes in a revision of statute will not be regarded as altering the law when it is settled by plain language in the statute or by judicial construction, unless it is clear that such was the intention. *Ibid.*

STATUTES CONSTRUED.

Constitution, Chapter II, sec. 63. (Common fishery in public waters).

Hazen v. Perkins, 414.

No. 140, Acts of 1896. (Constructing dam at outlet of Lake Morey).

Hazen v. Perkins, 414.

No. 228, Acts of 1908. (Constructing dam at outlet of Lake Morey).

Hazen v. Perkins, 414.

No. 99, Acts of 1912. (Negotiable Instrument Act). *Howard National Bank v. Arbuckle*, 86.

No. 147, Acts of 1912. (Automobiles. Intersecting Highways). *Aiken v. Metcalf*, 57.

No. 91, Acts of 1915. (Appeal from justice court). *N. Y. Plow Co. v. Maech*, 17.

- No. 258, Acts of 1915. (Ferry grant). *Jones v. Hoag*, 78.
- P. S. 2023. (Appeal from justice court). *N. Y. Plow Co. v. Maeck*, 17.
- P. S. 5726. (Non-support). Repealed by No. 101, Acts 1915. (But see G. L. 6831). *In re Turner*, 210.
- G. L. 919. (Suit to collect taxes). *Cook & Norton v. Sutton*, 242.
- G. L. 1561. (Chancery Appeal). *Pease v. Edgerton*, 401.
- G. L. 1875. (Title to State lands by prescription). *Hazen v. Perkins*, 414.
- G. L. 1891, 1892. (Competency of living party as witness). *In re Bugbee's Will*, 175; *Pope v. Hogan*, 250.
- G. L. 2002. (Trustee Process). *Ludlow Savings Bank & Trust Co. v. Knight*, 171.
- G. L. 2259. (Findings of fact by court). *Powell v. Merrill*, 124.
- G. L. 2301. (Appeal from justice court). *N. Y. Plow Co. v. Maeck*, 17.
- G. L. 2598. (Exception by State in criminal cases). *State v. Felch*, 477.
- G. L. 2884. (Negotiable Instrument Act). *Howard National Bank v. Arbuckle*, 86.
- G. L. 3521. (Contracts of married women). *Seaver v. Lang*, 501.
- G. L. 3560. (Ground of Divorce). *Whitaker v. Whitaker*, 301.
- G. L. 4394. (Resurvey of Highway). *Berkshire v. Nelson & Hall Co.*, 440.
- G. L. 4617, 4618. (Notice of injury from defective bridge or culvert). *Bigelow, Admr. v. St. Johnsbury*, 423.
- G. L. 4705. (Automobiles approaching curves). *Bigelow, Admr. v. St. Johnsbury*, 423.
- G. L. 4709. (Automobiles. Intersecting Highways). *Aiken v. Metcalf*, 57.
- G. L. 4709. (Providing automobiles with adequate brakes). *Bigelow, Admr. v. St. Johnsbury*, 423.
- G. L. 5623. (Imposing extra fees, etc., on foreign insurance companies). *Fidelity & Deposit Co. v. Brown*, 390.
- G. L. 6490, 6491. (Certification of agents of fourth-class licensees). *Fitzgerald Bros. Brewing Co. v. Kelley's Est.*, 471.
- G. L. 7005, 7006. (Adultery). *State v. Eaton*, 290.

TAX COLLECTOR.

See "TOWNS."

TENANCY BY ENTIRETY.

See "EVIDENCE" §§ 6, 7.

Legal interest of husband and wife as tenants by entirety is not identical, because husband has, in addition to his joint interest, a freehold interest during their joint lives. *Pope v. Hogan*, 250.

TENANCY IN COMMON.

See "ADVERSE POSSESSION"; "EVIDENCE" §§ 6, 7.

Tenant in common may acquire title by adverse possession against his co-tenant, but this presupposes an ouster, otherwise the possession of one is, in law, the possession of both. *Waterman v. Moody*, 218.

In determining whether certain acts of a tenant in common are evidence of an ouster and adverse possession, there is a distinction between the case where the adverse claim is asserted after entry as a co-tenant, and the case where the entry is accompanied by such adverse claim. *Ibid.*

Where an ouster is asserted by one after holding as tenant in common the presumptions are against him, and can only be overcome by acts indicating an assertion of ownership of the entire premises to the exclusion of the right of the co-tenant. *Ibid.*

Where the entry of a joint owner is not in subordination to the common title, and he enters under a deed purporting to convey the entire premises, he is presumed to have entered under a claim of right to the whole. *Ibid.*

Where an ouster by one tenant in common is established, title by adverse possession is proved as in case of adverse possession generally. *Ibid.*

Conveyance of the entire premises by one tenant in common with entry thereunder by the grantee claiming title of the whole, with notice thereof to the co-tenant, works an ouster of the latter. *Ibid.*

Payment of taxes by one co-tenant in possession is admissible on issue of a presumptive grant from other co-tenant. *Ibid.*

Payment of taxes by one tenant in common in possession will not alone show an ouster of his co-tenant. *Ibid.*

That the relation between two tenants in common were very friendly is admissible on issue of a presumptive grant from one to the other. *Ibid.*

Where there is evidence affording basis of an inference that a co-tenant had notice of an adverse claim to the entire premises, a finding of such notice will not be disturbed. *Ibid.*

Such acts of adverse possession that one reasonably attentive to his own interests would thereby know that an adverse right was being asserted, are sufficient to charge a co-tenant with notice of an adverse claim to the entire premises. *Ibid.*

That tenant in common was a careful business man was properly considered with other facts and circumstances on issue of presumptive grant from him to his co-tenant. *Ibid.*

To effect an ouster of co-tenant by entry and claim of title under deed of entire premises from other co-tenant, actual notice of the claim or circumstances from which notice will be presumed is required. *Ibid.*

TITLE.

See "ADVERSE POSSESSION."

TOWNS.

Tax collector has implied authority to procure legal advice at expense of town. *Cook & Norton v. Sutton*, 242.

Collector of taxes has no implied authority under G. L. 919 to institute a suit on behalf of the town, and attorney so employed by him is bound to know extent of collector's authority. *Ibid.*

In action against town for legal services, finding that employing of plaintiffs by tax collector to institute a suit to collect a tax was not ratified by selectmen or town agent is not inconsistent with evidence that town agent, selectmen and collector, after suit was brought, talked matter over with plaintiffs without suggesting that plaintiffs had not been properly employed, or that they disapproved or were dissatisfied with what had been done, and told plaintiffs that they would later make up their minds and advise them what they should decide to do. *Ibid.*

In such case, town was not estopped to deny liability, none of the items sued for having accrued after said conference. *Ibid.*

In such case, plaintiffs were not entitled to recover for a consultation with tax collector, town agent and selectman after suit was brought about advisability of pressing the same. *Ibid.*

TRIAL.

See "APPEAL AND ERROR" § 5; "CHATTEL MORTGAGES"; "CRIMINAL LAW" §§ 3, 4; "DAMAGES"; "FRAUD" § 2; "JURY"; "PARTIES"; "REFERENCE"; "WITNESSES" § 2.

§ 1. Course and Conduct of Trial in General.

In tort action, where two defendants can be held jointly or severally liable as the evidence warrants, plaintiff cannot be compelled to elect against which defendant he will proceed. *Beaulac v. Robie*, 27.

§ 2. Reception of Evidence.

Trial court, in its discretion, can allow a party to withdraw his rest and introduce further testimony. *Phelps v. Utley*, 40.

In such case, it is error to deny the opposing party time to get witnesses to meet new testimony. *Ibid*.

Not error to allow the contradiction of evidence not responsive and yet in its nature prejudicial. *Farmer v. Williams*, 132.

Offer of relevant matter is not vitiated by irrelevant matter. *In re Bugbee's Will*, 175.

When evidence is not as matter of law too remote to be admissible, its admission, as against objection of remoteness, is in court's discretion. *Waterman v. Moody*, 218.

Error in the exclusion of evidence of a parol gift of land to their predecessor in title offered by defendants as a basis for their claim of adverse possession is not cured by giving them opportunity to show such fact on surrebuttal to meet plaintiff's evidence that he was in possession under a lease. *Pope v. Hogan*, 250.

Where party does not move to have evidence struck from the record, but merely objects to its reception unless something further appears, and, after a subsequent question and answer suggested by his objection, it is struck out by the court on its own motion, there is no error. *Hefflon v. Cashman*, 323.

Where evidence comes in without objection, all right of objection is waived, and it is within court's discretion to hold the party to his waiver or to strike out the testimony. *In re Martin's Est.*, 362.

Error in the admission of evidence is rendered harmless by the other party putting in evidence of the same subject matter. *In re Barron's Est.*, 460.

It is not error to exclude evidence of matters wholly outside the issues made by the pleadings. *Seaver v. Lang*, 501.

§ 3. Arguments and Conduct of Counsel.

Improper remarks made during cross-examination of a party will not cause reversal where prejudice is not made to appear; and where

trial was by court it will be assumed that no harm resulted. *Powell v. Merrill*, 124.

In negligence case, improper to announce in hearing of jury that an insurance company is the real defendant. *Spinney's Admrz. v. Hooker*, 146.

Error to allow a remark of counsel that there was a disposition on the part of the other side to interfere with the examination of a witness to go unwithdrawn and unrebuked; but whether prejudicial error not decided. *In re Martin's Est.*, 362.

§ 4. Questions of Law and Fact.

Negligence of a connecting carrier in failing to protect goods it had undertaken to transport against high water was a question for the jury. *Porter Screen Mfg. Co. v. C. V. Ry. Co.*, 1.

Whether, on the evidence, defendant's agent was justified in relying upon a prediction by a weather forecaster published in a newspaper as to the probable danger to be expected from a flood was a question for the jury. *Ibid.*

Where it is master's duty to keep apparatus safe, it is question for jury whether such inspection as this duty required would have discovered defect. *Spinney's Admrz. v. Hooker*, 146.

On the evidence, question for jury whether defective condition had existed before accident, and for so long a time that defendant ought to have discovered it. *Ibid.*

On the evidence, questions of contributory negligence and assumption of risk were for jury. *Ibid.*

Where a party, in testifying, makes contradictory statements, it is for the jury to say which of such statements they will accept. *McDonald v. McNeil*, 356.

§ 5. Direction of Verdict.

Where neither party wishes to go to the jury it is for the court to direct such a verdict as it regards proved by the evidence, and the verdict will be upheld if there is any evidence to sustain it. *Brightlook Hospital Ass'n v. Garfield*, 353.

It is not enough that each party moved for a verdict to establish a consent that the court might take the case from the jury, but it must affirmatively appear that neither party wished to go to the jury. *Seaver v. Lang*, 501.

§ 6. Charge of Court.

Charge construed, and held to be without error. *Porter Screen Mfg.*

Co. v. C. V. Ry. Co., 1; *Baldwin v. Gaines*, 61; *Villa v. Thayer*, 81.

In action for personal injuries, it is error to submit to jury question of plaintiff's loss of earnings, in absence of evidence of previous earnings and earning capacity. *Beaulac v. Robie*, 27.

Where plaintiff's evidence supports his claim, court will not direct verdict for defendant because his evidence tends strongly to disprove his negligence. *Baldwin v. Gaines*, 61.

Not error to refuse to charge jury as to statement of an abstract principle of law without reference to the matter of the context and without anything to indicate how jury should apply it to the evidence. *Vermont Box Co. v. Hanks*, 92.

In action to recover borrowed money, not error to refuse to charge that jury must find from the evidence that defendant had the use of plaintiff's money. *Farmer v. Williams*, 132.

In an action to recover for two carloads of coal sold and delivered, not error to charge that if the coal was received and used by defendants after they received a letter from plaintiff in which he stated the price per ton, defendants were bound to pay that price. *Dexter & Carpenter, Inc. v. Fillmore & Slade*, 247.

A request to charge on an abstract question of law not applicable to facts in issue is properly refused. *Wells v. Blodgett*, 330.

Where, in an action for personal injuries received in a collision, the court instructed the jury that if the defendant used the care and prudence of a prudent man, and therefore was not negligent, the verdict must be for him, it was not error to charge specifically with reference to the law of unavoidable accident. *Larrow v. Martell*, 435.

It is error to submit to the jury a basis of recovery not alleged in the declaration. *Dodge Bros. v. C. V. Ry. Co.*, 454.

When a supplemental instruction is given on a point excepted to in the original charge, the exception must be renewed or the supplemental instruction will be regarded as satisfactory, and the error, if any, cured. *Ibid.*

When a supplemental instruction is a reiteration of the point excepted to in the original charge, the excepting party is entitled to the benefit of his original exception. *Ibid.*

In an action on a note, defended on the ground of forgery, an instruction, as given, sufficiently excluded the idea of conclusiveness in the presumption of innocence. *In re Barron's Est.*, 460.

An instruction to the jury that, "It is immaterial when this note was signed, if it was signed by A. J. Barron, the defendant's intestate," was without error. *Ibid.*

Where the defendant called the plaintiff as a witness, a general exception to an instruction to the jury regarding the plaintiff's testimony, did not cover the specific claim that the instruction disregarded the plaintiff's interest and bias as an adverse party in testifying. *Ibid.*

A request for an instruction as to a ground of recovery not claimed by the plaintiff was properly refused. *Arnold v. Somers*, 512.

§ 7. Trial by Court.

Requests for findings of fact which relate to matters of evidence solely for the consideration of the court are properly refused. *Mount Holly v. Cavendish*, 38.

A finding that property is covered by a lien for the full amount of the purchase price is equivalent to a finding that the amount of the lien is all that the property is worth. *Humphrey v. Wheeler*, 47.

Under G. L. 2259, findings of fact cannot be enlarged by a reference to the transcript and exhibits contained in the bill of exceptions. *Powell v. Merrill*, 124.

Not error for court to fail to state in its findings the effect given to every subordinate fact. *In re Bugbee's Will*, 175.

Court can make transcript of evidence part of its findings of fact and controlling only that Supreme Court may examine the evidence to see whether the court erred in finding or refusing to find certain facts. *Ibid.*

Failure of court to draw a certain inference from evidence is not reviewable when more than one inference can be drawn. *Ibid.*

Motion made for further examination of trustees, after judgment has been rendered on their disclosures, is addressed to the court's discretion. *Bundy v. Shelton Swallow Co.*, 193.

TRUSTS.

See "HUSBAND AND WIFE."

A trustee must keep proper books and records, and, upon being called to account, has the burden of making a proper accounting and proving the credits claimed; upon his failure to do so, all intentions are against him. *Stockwell v. Stockwell's Est.*, 489.

It is unnecessary for a *cestui* in his action for an accounting to show that there is anything his due. *Ibid.*

TRUSTEE PROCESS.

See "PARTIES."

Extent to which claimant is party to a suit. *Vermont Fruit Co. v. Wilson*, 112.

Real estate is not included in "goods, effects or credits," the possession of which a person may be adjudged a trustee under G. L. 2002. *Ludlow Savings Bank & Trust Co. v. Knight*, 171.

Where defendant assigned note payable to himself to A. in consideration of his future support, and A. surrendered the note, receiving therefor part cash and a new note running to himself, A. can be held as trustee of defendant under G. L. 2002. *Ibid.*

VARIANCE.

See "MASTER AND SERVANT" § 2.

Term "variance" in its legal sense means material difference. *Johnson v. Doubleday*, 267.

VENDOR AND PURCHASER.

The vendor in an executory contract under seal for the purchase of land containing an absolute promise to pay the purchase price, and where the vendee is in possession, can maintain an action for the recovery of the purchase money under an appropriate common count. *Seaver v. Lang*, 501.

In such case, the vendor is not confined to an action of damages for the breach of the contract, but can proceed in equity, can bring ejectment, can sue for general damages, or he can sue for the purchase money. *Ibid.*

VERDICT.

See "APPEAL AND ERROR" §§ 2, 5 (B) (C); "TRIAL" § 5.

WAREHOUSEMEN.

See "CARRIERS."

WARRANTY.

See "CONTRACTS" § 1; "SALES" § 2.

WATERS AND WATER COURSES.

See "FERRIES"; "MUNICIPAL CORPORATIONS"; "NAVIGABLE WATERS."

WILLS.

See "EQUITY" § 2; "WITNESSES" § 1.

§ 1. Generally.

A will speaks as of the time of the testator's death. *In re Bugbee's Will*, 175.

§ 2. Testamentary Capacity.

Upon the issue of testamentary capacity, it is competent to show the person's mental condition at any reasonable time before or after the testamentary act; the range of inquiry resting largely in the trial court's discretion. *In re Martin's Est.*, 362.

That a witness as to testamentary capacity had only known the decedent for about three weeks before his death, and that he was then very weak and sick, affected the weight of her testimony and not its admissibility. *Ibid.*

Where the person who drew the will testified that the conduct of the decedent's wife at the time was such that he asked for a separate room in which to complete the business, it was not error to allow the wife to testify that at the time of the request she might have been a little excited, but was not loud and quarrelsome. *Ibid.*

Evidence that formerly the decedent had confidence in the business ability of the witness and entrusted her with certain business matters, but from and after a certain time his mental attitude toward her business ability changed, was admissible, it being the theory of the contestant that a decided change came over the decedent at or about that time. *Ibid.*

In determining the mental capacity of a testator, the jury may consider the naturalness or unnaturalness of the will. *Ibid.*

§ 3. Rights and Liabilities of Devisees and Legatees.

Where remainderman under will, under which no executor has been appointed, desires to protect his interest from waste, he should apply to probate court for appointment of executor. *Wheeler's Guardian v. Wheeler*, 167.

Burden of proving that testator during his lifetime changed an advancement into an absolute gift is upon beneficiary who claims that her share of the estate should not be extinguished thereby. *In re Bugbee's Will*, 175.

Right to have property delivered by a testator to a legatee reckoned as an advancement is his right, and he may discharge it in the same way that he may relinquish any other right. *Ibid.*

The taking and retention of a receipt by testator from legatee stating that the delivery of certain stock was an advancement was not conclusive evidence of an advancement, and evidence of testator's intention to change advancement to an absolute gift was admissible. *Ibid.*

Rule that legacy is adeemed by delivery of property to legatee by testator during lifetime applies only when will indicates testator's intention that property is to be enjoyed in specie in its existing state, and property bequeathed must be identified as that subsequently delivered. *Ibid.*

Cannot be said, as a matter of law, under the circumstances, that legacy of certain number of shares of bank stock was adeemed by the delivery of an equal number of shares of the stock by the testator to the legatee. *Ibid.*

WITNESSES.

See "APPEAL AND ERROR" § 5; "EVIDENCE" § 10; "HUSBAND AND WIFE"; "TRIAL" § 2.

§ 1. Competency.

Under P. S. 1589, as amended by No. 64, Acts 1908, and P. S. 1590 (G. L. 1891, 1892), the living party can testify not alone to meet and explain the testimony of a living witness, but also any legitimate inference deducible therefrom. *In re Bugbee's Will*, 175.

To meet evidence that a legatee, since deceased, received stocks from the testator as an advancement, legatee's daughter is competent witness that testator told her that legatee was to share in his estate and referred to the gift of stock as a perfected gift. *Ibid.* Wife is competent witness to testify to gift to her husband, after death of donor. *Popc v. Hogan*, 250.

Under G. L. 1891, it is the death of a sole party to a contract that operates to exclude the other party from testifying. *Ibid.*

Where defendants introduced evidence of a parol gift to their predecessor in title, since deceased, as the basis of a title by adverse possession, one of the claimed donors is competent to testify that such predecessor in title occupied under a lease, and not by gift. *Ibid.*

§ 2. Examination and Cross-examination.

Where witness, on direct examination, refreshed his recollection by certain papers, cross-examiner is entitled to have such papers

- handed to him for purpose of cross-examination, but is not entitled to other papers held in witness' hand while testifying, but not referred to by him. *State v. Rossi*, 187.
- In such case, court can ascertain what papers cross-examiner is entitled to by inquiry from counsel and witness and by examination of all the papers. *Ibid*.
- In action for assault and battery, where defendant testified he had seen plaintiff strike and kick another person, it was proper cross-examination to ask him if that person had not been greasing the face of the plaintiff's hammer. *Russ v. Good*, 202.
- It is within the trial court's discretion to allow testimony not in line of strict cross-examination where its admission does not result in surprise or prejudice to the opposing party; and it is immaterial that the other party's case is in some respects anticipated thereby. *In re Martin's Est.*, 362.
- It is within trial court's discretion to allow leading and suggestive questions. *Ibid*.
- It is within trial court's discretion to permit a witness on cross-examination to be asked whether he had been convicted of selling liquor without a license. *In re Barron's Est.*, 460.

WORDS AND PHRASES.

- "Due Process of Law."—*State v. Felch*, 477.
- "Field."—*State v. Mack*, 103.
- "Incompetency."—*Barclay v. Wetmore & Morse Granite Co.*, 195.
- "Material Particular."—*Howard National Bank v. Arbuckle*, 86.
- "Pure and Simple Accident."—*Larrow v. Martell*, 435.
- "Similar."—*Fidelity & Deposit Co. v. Brown*, 390.
- "Unavoidable Accident."—*Larrow v. Martell*, 435.
- "Variance."—*Johnson v. Doubleday*, 267.

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